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

Case Number: **20909/2022**

In the matter between:

JOHANNES PETRUS DU BOIS N.O. First Plaintiff/ Excipient

GIDEON THEODORUS GELDENHUYS N.O. Second Plaintiff/ Excipient

MARNE GELDENHUYS N.O. Third Plaintiff/ Excipient

In their capacities as trustees of the BASIE GELDENHUYS TRUST (I[...])

and

THE SKI CLUB OF SOUTH AFRICA Defendant / Respondent

Date Heard: 24 October 2023

Date delivered: 09 May 2024

JUDGMENT DELIVERED ELECTRONICALLY

Nziweni, J

Introduction and Background

[1] This is an interlocutory application by the plaintiffs [the excipients] who raise a number of exceptions against the defendant's counterclaim. But, insofar as the defendant's plea, no exception has been raised.

[2] For ease of reference, I shall refer to the parties as the plaintiffs and the defendant. The application is strenuously opposed by the defendant.

[3] This application has its genesis in an action of unlawful possession of immovable property taken by the plaintiffs against the defendant. To the averment of unlawful possession of the piece of land, the defendant has pleaded and entered a counterclaim.

[4] In the main action the plaintiffs aver that the defendant is in unlawful possession of part of the immovable property of the Basie Geldenhuys Trust. The part of the land in question is located on the slopes of the Matroosberg Mountains.

[5] The defendant claims that it has acquired a personal servitude to access and use the farm by virtue of section 2 (1) of the Prescription Act, Act 18 of 1943 (the Act"), and section 6 of the Act. Consequently, it prays for a declaratory order to the effect that it has personal servitude in perpetuity.

[6] The plaintiffs are cited in their capacities as trustees of the Basie Geldenhuys Trust. On the other hand, the defendant is the Ski Club of South Africa, a voluntary association. The Basie Geldenhuys Trust is the owner of the Farm Spekrivier (the farm), 1063, 001 hectares in extent.

[7] By way of background, the plaintiffs' complaint against the defendant's pleading is based upon grounds that are divided into two main parts. Shortly, the exception grounds are: (a) the counter claim fails to disclose a cause of action; or (b) lacks a material allegation necessary to sustain a cause of action for the relief claimed; (c) alternatively, the counterclaim purport to formulate a claim based on

a cause of action which is bad in law. Under part B the ground of exception is mentioned as vague and embarrassing.

[8] I have already mentioned in passing the plaintiffs' complaints, as far as the defendant's pleading is concerned. However, it seems prudent and necessary that before turning to the details of each party's submissions; I shall cite part of the defendant's plea and counterclaim for convenience of reference.

[9] In the defendant's plea the following is averred:

"3.1 Since 1935, the defendant has:

3.1.1. accessed a portion of the land now forming Farm Spekrivier No. 499, as referred to in paragraph 5 of the particulars of claim (**Spekrivier**);

3.1.2. using the accessed portion Spekrivier for of hiking, skiing, overnight accommodation and related activities of the defendant; and

3.1.3. has installed certain structures and improvements at the accessed portion of Spekrivier, including a ski-lift and certain buildings.

3.2. A diagram showing the portion of Spekrivier that the defendant has accessed and used as set out above is attached marked "**P1**".

3.3 The defendant has enjoyed the aforesaid access and use for continuous period of at least 30 years between 1957 and the date of this plea, and has done so:

3.3.1. Without the use of force;

3.3.2. Openly;

3.3.3 *Nec precario*; and

3.3.4. As though it were entitled to such access and use.

[10] In the defendant's counterclaim the prayer is phrased as follows:

"WHEREFORE the defendant requests the Court:

1) To declare that the defendant has a personal servitude in perpetuity to access and use the portion of the land forming part of the Farm Spekrivier . . ., as indicated in annexure P1 to this counter claim, for purposes of hiking, skiing, overnight accommodation and related activities of the defendant." Own emphasis.

[11] So far as the defendant's counterclaim is concerned, it may be helpful here to quote the full grounds upon which the exceptions are based.

[12] In respect of the first exception [Failure to disclose a cause of action], as mentioned earlier, two areas of complaint were identified.

They are stated as follows:

> "1. In paragraph 3 of the Defendant's Counterclaim it is alleged that the Defendant has acquired a personal servitude of access and use over a portion section forming part of the Plaintiff's immovable property (portion of the Farm Speksrivier No. 499") by virtue of provisions of section 2 (1) of the Prescription Act, 18 of 1943 and /or section 6 of the Prescription Act, 68 of 1969 ('the running of acquisitive prescription").

2. The Defendant's Counterclaim (as formulated in prayer (i) of the pleading) is directed at the obtaining of a declarator to the effect that the Defendant is possessed of "*a personal servitude in perpetuity to access and use*" portion of the Farm Spekrivier No. 499 as further alluded in the said prayer.

3. In terms of South African law personal servitudes are not perpetual, but subject to a source of extinguishment that does not apply to praedial servitudes. In instances here juristic persons such as the Defendant are the beneficiaries of a personal servitude (such as the one claimed by the Defendant) the servitude terminates when the juristic person- beneficiary of the personal servitude is dissolved or after 100 years, whichever occurs first.

4. In the premises, the pleading fails to disclose a cause of action or lacks material allegations necessary to sustain a cause of action for the relief claimed in prayer (i) thereof, alternatively purport to formulate a claim based on a cause of action which is bad in law."

[13] In respect of the second exception the complaint is phrased as follows:

"5. In paragraph 3 of the Defendant's Counterclaim, as read with paragraph of its Plea, it is alleged that the Defendant has acquired a personal servitude of access and use over portion and use over portion of the Farm Spekrivier No. 499 through the running of acquisitive prescription in that it had enjoyed access and use (in the manner pleaded) "*for a continuous period of at least 30 years between 1957 and the date of the plea*" – which period (taking into account that the Plea was dated 1 February 2023) extends over well-nigh 66 years.

6. The Plaintiffs repeat their contentions as set out in paragraph 3 above and in particular plead that, as a best-case scenario, whatever personal servitude the Defendant could have acquired by acquisitive prescription would in law terminate upon expiry of a period of 100 years from the date upon which prescription had run its course ("the inception date of the personal servitude claimed").

7. To the extent that the Defendant has failed to allege what the inception date of the personal servitude claimed is, the pleading fails to disclose a cause of action or lacks material allegations necessary to sustain a cause of action for the relief claimed in prayer (i) thereof, alternatively, purport to formulate a claim based on a cause of action which is bad in law. . .

8. In the alternative to the Second Cause of Complaint . . .

8.1. Repeat the contents of paragraph 5 and 6 above;

8.2. Plead that the failure on the part of the Defendant to allege when precisely over the 66 year time span (alluded to in paragraph 5 above) the inception date of the personal servitude claimed by the Defendant (which in law can only be of limited duration) is supposed to have been, the pleading is rendered vague and embarrassing within the meaning of Rule 23 (1).

[14] I have had the benefit of the heads of arguments from counsels and also oral arguments and I have been immensely assisted by them. The parties' submissions were comprehensive. It is, of course, almost impossible to condense all the submissions of the parties into few paragraphs. That does not necessarily mean that some of the party's submissions are not relevant in this

case. However, I have endeavoured to summarise the parties' submissions as follows.

Plaintiffs' submissions

[15] As I have already indicated, the first exception is founded *inter alia* on the argument that the defendant's claim for a personal servitude in perpetuity to access and use portion of the farm, is bad in law. It is submitted that in terms of South African law, the defendant's claim in its current form is completely unsustainable.

[16] It is further contended on plaintiffs' behalf that personal servitudes are not perpetual but are subject to a source of extinguishment that does not apply to *praedal* servitudes. It is also asserted on behalf of the plaintiffs that when a juristic person such as the defendant are the beneficiaries of a personal servitude, the personal servitude terminates when the juristic person-beneficiary of the personal servitude is dissolved or after 100 years, whichever occurs first.

[17] Mr de V La Grange developed these submissions in the course of his argument. He submitted that the defendant's failure to plead the inception date of the servitude, so the argument continues, renders the counter claim vague and embarrassing. In addition, the plaintiffs' counsel strenuously urged that the defendant has failed to allege the inception date of the personal servitude. It is further the contention of the plaintiffs that in terms of the law, personal servitude cannot extend beyond a period of 100 years.

The defendant's submissions

[18] It was vehemently contended on behalf of the defendant that the legal argument raised by the plaintiffs can be argued at trial. Hence, it is argued that the exception procedure is not appropriate for the legal argument raised.

[19] It is further argued that an exception procedure is designed to obtain a decision on a point of law which will dispose of the case in whole or in part. And if it is not to have that effect the exception should not be entertained.

[20] So far as the complaint related to a cause of action is concerned, it is contended that a cause of action is properly pleaded by the defendant. And this is so because, the defendant asserts its right based upon a personal servitude and it has pleaded the material facts upon which such claim is based.

[21] It is asserted that in addition to that, the defendant has prayed for “further and or alternative relief” in its counterclaim. Thus, the defendant, notwithstanding the fact that it prayed of its right in perpetuity, it is entitled, depending upon evidence led, to a lesser relief [period of servitude].

[22] According to the defendant, the plaintiffs take issue with the extent of the relief claimed by the defendant rather than the cause of action underpinning such relief.

[23] Furthermore, it is contended on behalf of the defendant that the counter claim is not vague and embarrassing as it sets out the required averments. According to the defendant, for the proposition that this Court should declare that the defendant has a personal servitude in perpetuity, it is sufficient that the defendant has alleged the following:

1. possession as if owner;

2. possession for uninterrupted period of 30 years; and

3. possession was exercised openly.

[24] It is argued on behalf of the defendant that the date of inception is neither here nor there. Accordingly, it is argued that there is no obligation to plead the inception date, and it is submitted that this is a matter that is to be efficiently addressed at trial through evidence.

[25] It is also contended on behalf of the defendant that the defendant's allegation in its plea which is cross referenced in the counterclaim, is not vague. According to the defendant, what stems out of the averments made is that defendant has enjoyed the access and use for a continuous period of at least 30 years, between 1957 and the date of the plea.

[26] Mr Landman illustrated his argument by arguing that the inception date is pleaded as being 1957 and that the word "between 1957" cannot reasonably mean anything other than the date of inception of the claimed possession. So, the argument continues that the start date for adjudication is pinned at 1957.

[27] It is the defendant's contention that if there are minor blemishes and unradical embarrassments caused by a pleading those can and should be cured by further particulars and the plaintiffs are at liberty to ask for further and better particulars if it deems itself entitled to such information.

Condonation in respect of the second objection

[28] First and foremost, the defendant's challenge, insofar as the second objection, was addressed to the fact that the exception is not properly before this Court. It is asserted that the notice to remove the cause of complaint was served outside of the specified time limit stipulated in rule 23 (1). The defendant did not vigorously pursue the failure to comply with the rule. In fact, it was submitted that if the Court does find that the defendant would not be prejudiced by the non-compliance with the rule, it should condone the same.

[29] This Court was not referred to any prejudice caused by the failure to comply with the rule. In respect of prejudice Mr de V La Grange contended that there was no prejudice. In this matter, there is no evidence of actual prejudice.

[30] Hence, I take the view that, the plaintiffs' failure to comply with the Rules of Court is virtually not going to be prejudicial to the defendant. In the circumstances, there is, therefore, no reason why this court cannot condone the failure by the plaintiffs to comply with the requirements of rule 23 (1).

Evaluation

[31] Turning now to the Court's evaluation. I consider it unnecessary for this judgment to recite the statutory provisions of the relevant rule. It is enough to observe that the plaintiffs' exceptions concern the provisions of rule 23.

Part A of the compliant; Does the counterclaim disclose a cause of action or lacks material allegations necessary to sustain a cause of action for the relief claimed in prayer (i)?

[32] Insofar as this particular complaint is concerned, the question before this Court is not whether defendant's counterclaim is factually meritorious but rather, whether the counter claim discloses a cause of action or lacks certain particulars that are necessary to sustain a cause of action.

[33] Rule 18 (4) provides that every pleading shall contain a clear and concise statement of material facts upon which the pleader relies for his or her claim. Therefore, a party cannot withhold facts that it intends to prove. There is thus a requisite standard to be met by a pleading. Hence, amongst others, the purpose of a pleading is to spell out with clarity a party's case and set out the facts to justify the allegations the party is making. A pleading also informs a party of the case it must meet.

[34] It is settled that a claim must disclose a cause of action. What this boils down to is that a claim that does not disclose a cause of action or lacks averments which are necessary to sustain an action is excipiable.

[35] A broad reading of the plaintiffs' exception encompasses that, the defendant brings forward a claim that it is not entitled to make use of. I have already indicated that according to the plaintiffs the counterclaim of the defendant is certain to fail as it is bad in law.

[36] It is true that, it is not for this Court on a motion to reach a decision as to the defendant's chances of success. In any event, the strength of the party's case is not relevant as far as an application for exception, is concerned. This Court, thus, has to determine as to whether the defendant's counterclaim presents a case which is fit for adjudication.

[37] Generally, at this stage of the proceedings, a party should allege facts that make his alleged claim to be plausible. In a plethora of cases such as *Buchner and Another v Johannesburg Cons Investment Co Ltd* 1995 (1) SA 215, it has been stated that a pleading which propounds the party's own conclusion and opinions instead of material facts is defective and does not set out a cause of action. In the *Buchner* matter, *supra*, it is succinctly stated that it would be wrong for a court to endorse a party's opinion by elevating it to a judgment without first scrutinizing the facts upon which the opinion is based.

[38] The defendant's pleading discloses that the defendant accessed the farm in 1935 and used it for hiking, skiing, overnight accommodation and related activities. It is further asserted that the defendant also installed certain structures and improvements on the portion of the farm. In paragraph 3.3 of the defendant's plea, it is averred that the defendant has enjoyed the access and use for a continuous period, openly, without the use of force, *nec precario* and as though it were entitled to do so.

[39] Assuming the averment stated in the defendant's plea and counter claim are true, it means that the defendant has been accessing and using a portion of the farm for at least 30 years. In paragraph 3 of the counterclaim the defendant states that in light of the aforesaid facts, it acquired a personal servitude to such access and use by virtue of the Prescription Act. Paragraph 3 of the counter claim is not a statement of fact but a conclusion of law.

[40] Interestingly enough, the basis for the defendant's counter claim as pleaded can be summarised as personal servitude of access and use which accrued by acquisitive prescription. And bearing in mind that the defendant seeks an order that would declare the personal servitude perpetual. In this case, plainly the defendant's counterclaim is an action to declare personal servitude perpetual. Intriguingly, the nature of the claim that the defendant seeks is that it is entitled to claim a relief in perpetuity.

[41] For what it is worth, in this matter, it is common ground between the parties that the servitude right claimed by the defendant is a personal servitude. A number of authorities state that a personal servitude, unlike a *preadal* servitude, cannot be perpetual. This extensive body of authority reflects that a servitude cannot by the common law be granted to juristic person for more than 100 years. See *Johannesburg Municipality v Transvaal Cold Storage* (1904) 3 TS 739 (3 September 1904) 730; see also CG Van Der Merwe "Can personal servitudes be worded in such a way that they are perpetual in nature and thus freely transferable and transmissible?" 2013 TSAR 340; where Van Der Merwe opines:

> "There may be instances in which our courts could be persuaded to create new law to endow certain personal servitudes with transferability and transmissibility. However, only certain personal servitudes should be earmarked for such treatment, and this should happen only where, as in the case of mineral rights, there is a clear commercial or other need for

such recognition. All in all, it should be kept in mind that the recognition of a personal servitude of a perpetual nature would burden landed properties to such an extent that commerce in such properties would be stilted. In the event that, as in the case of mineral rights, the need for recognizing new perpetual rights becomes patent, the courts should consider whether it would not be a better option to recognise a new limited real rights, if necessary, as being of a *sui generis* character instead of forcing them into the mould of personal servitudes"

[42] *JC Sonnekus* "*Opvolging van plaaslike owerhede en onbedagte gevolge vanuit die matriële sakereg*" 2003 TSAR 141, Sonnekus stated the following:

> *"Die Suid Afrikaansereg, soos ook reeds die gemenereg, oderskei tussen erfdiensbaarhede en persoonlike diensbaarhedeaas voorbeelde van beperktesaaklike regte binne die breëindeling van serwitute . . . Persoonlike diensbaarhede is dus in beginsel nie lang durig van aard nie . . .*
>
> *Van die kant van die eienaaar van die dienendegrondstuk gesien,beteken dit dat die beperking op sy bevoeghede weens ń persoonlike diensbaarheid minstens nie ewigdurend kan wees nie. Dit word beperk tot hetsy die uitdruklike termynbepaling waaraan diensbaarheid gekoppel is of maksimaal in die geval van ń natuurlike person, tot met die afsterwe van die diensbaarheids-reghebbende, welke van die twee gebeure eerste sou aanbreek. Indien die reghebbende ń regspersoon is, word gemeenregtelik aanvaar dat die mksimum duurte van ń persoonlike diensbaarheid 100 jaar sou wees . . .*
>
> *Die beginsel het reeds meerdere kere in die gerapporteerde Suid – Afrikaanse regspraak neerslag gevind* . . ."

[43] I distill from the above authorities, *inter alia*, that as the law now stands, a personal servitude by a juristic person has a life span and cannot be perpetual. It

seems to me that in applying these principles to the present case, it is quite clear that the relief sought in the counterclaim, in the circumstances of this case, is not sustainable. In accordance with the above cited authorities, it is evident that the relief sought herein by the defendant may not be granted by a court. Thus, the relief sought by the defendant presents a legal problem for the defendant. I do not think there is any merit in defendants' position, nor has it cited any precedent for it. Hence, Mr de V La Grange, cannot be faulted for contending that the defendant is claiming something which it cannot claim in law. As stated by plaintiffs' counsel, it is, I am afraid, quite impossible for any court to take a quantum leap in law that is not permitted.

[44] It is further submitted on behalf of the plaintiffs that the defendant cannot aim for the moon and hope that even if they miss, they'll land among the stars. So, the argument continues, the defendant cannot claim that it pleaded the right facts, but those facts cannot be sustained by the prayer. This much was stated in *Stephen v Liepner* 1938 WLD on page 35, when the court stated the following:

> "I have come to the conclusion that the measure of damages claimed by the plaintiff is untenable on the allegations in the declaration. It was, however, that on the present allegations evidence of damage resting on any special circumstances could be objected to on the ground that they are not covered by the declaration . . . [I]t was held that if a special damage is claimed it must be stated with particularity in the pleadings . . . [O]n the allegations in the declaration, the plaintiff is claiming damages which are not legally supportable and I see no reason why the defendant need wait until the trial in order to establish this point."

[45] So far as I can assess, the very same principle is also applicable when a party seeks a relief that would declare a personal servitude to be perpetual. It seems to me that, the counterclaim fails to allege the key allegations of facts upon which such claim may be granted. In other words, there is an irreconcilable conflict

between the facts pleaded in the counterclaim and the prayer sought. In the circumstances, it was thus necessary for the defendant to plead or set out specifically as to under what circumstances is the relief that it is seeking [servitude in perpetuity] is predicated. At the very least, the plaintiffs are entitled to know upon what grounds the defendant claims servitude in perpetuity. The point is of particular importance in this case because of the relief sought by the defendant. Thus, clear grounds have to be alleged to support the claim sought. The prayer of further and alternative relief can never replace the importance of a pleading. Equally, the prayer of further and alternative relief cannot cure a defective pleading. It is clear that a serious want of particularity in a pleading can be cured by an amendment.

[46] I am disposed to agree with the plaintiffs' contention that the facts pleaded would not sustain the extreme prayer the defendant seeks which is perpetual servitude based on personal servitude. Moreover, as mentioned earlier, the relief sought in the defendant's counterclaim is contrary to South African law.

[47] It was argued on defendant's behalf that the trial court is best equipped to deal with the issue of servitude. But what is the point of taking to trial an issue that is a non-starter, as it is bad in law.

[48] Additionally, it was argued on defendant's behalf that this case calls for the development of common law. Clearly, there should be factual allegations justifying a departure from the law as it stands. The authors of *Amler's Precedents of Pleadings* state that a party that wishes to rely on a developed rule, it will be necessary to plead the anticipated or required legal rule.

Part B of the complaint; Vague and embarrassing

[49] It should be observed that I am mindful of the fact that the inception date of a personal servitude, by a juristic person, is a necessary averment to plead.

Moreover, it bears noting that it is settled now that a personal servitude does not convey or vest to the holder of such right in perpetuity.

[50] The central issue to resolve in this complaint is whether it is vague and embarrassing for a lack of a necessary averment.

[51] According to the submissions made on behalf of the defendant, it is clear from the defendant's plea and counter claim that the inception date is reflected as between 1957 and the date of the defendant's plea. I do not find this argument persuasive. There are no sufficient facts set out in the defendant's plea or counterclaim to warrant such an inference. It bears noting that the plaintiffs should not be left to speculate as to the legal and factual basis for the defendant's counterclaim.

[52] As mentioned previously, a pleading or a claim must provide sufficient notice of the facts claimed and the issues to be tried. A party cannot subject a court to a fishing expedition. Hence, a party has to plead its case with adequate facts. To this end, full particulars of claim containing necessary dates, should be stated in a pleading. It is strenuously argued on plaintiffs' behalf that in light of the defendant's claim, the inception date is a necessary averment.

[53] It is apparent from the defendant's counterclaim that it is asserting an entitlement to part of the farm. However, clause 3.3 of the defendant's plea does not state as to when the inception date of the personal servitude was. It merely states that the defendant has enjoyed the access and use for a continuous period of at least 30 years between 1957 and the date of the plea.

[54] I am disposed to agree with the contention that, it is not possible to discern from the defendant's pleading as to when the alleged conduct of obtaining the personal servitude occurred as there is no specific date provided. The inception date of the personal servitude is important because it is the factual and a legal

basis for the claim of personal servitude. This is so because, a personal servitude has got a lifespan. Therefore, it is critical to know whether the personal servitude is extant. Here it is apparent that the inception date should have been alleged by the defendant.

[55] After reading the defendant's plea and the counter claim it is plain and obvious that there are two dates contained in the plea, one is '1935', and the other one is stated as 'between 1957 and the date of the plea'. In my mind, given the fact that the claimed personal servitude is not based upon an agreement, but on prescription; the inception date is a pertinent and a necessary averment. Consequently, so far as any date is of importance, the "inception" date is paramount.

[56] This is so, because, as correctly pointed by the Mr de V La Grange, that personal servitude is not perpetual. The inception date determines every feature of a personal servitude that can be affected by a date. Thus, amongst others the two dates [mentioned in the defendant's plea] create an ambiguity as to whether the inception date should be calculated from 1935 or from1957. Put differently, they create an ambiguity as to whether the lifespan of the alleged personal servitude began from 1935 or 1957.

[57] As it was noted earlier, it is contended on the defendant's behalf that it is plain from the plea that the inception date is from 1957 to the date of the plea. But this argument incorrectly conflates the issue of inception date and date of acquisitive prescription. Additionally, in the context of this matter, I am of the firm view that this contention is without merit because it is apparent that it simply ignores the other date [1935] averred in the defendant's plea [as the date upon which the defendant began to have access on the land in question]. A plain reading of the pleadings does not lead to the conclusion that the defendant is arguing.

[58] As noted above, the inception date for the personal servitude is not specifically pleaded, even though at the outset of the defendant's plea it is mentioned that the defendant began to have access in 1935. In any event, the year 1935 is also not clearly pleaded as the inception date of the personal servitude. In the context of this case, the year 1935 cannot fairly be read to encapsulate the inception date as the plea does not contain any hint, even in general terms, that the year 1935 is the inception date.

[59] The embarrassing part of the counter claim arises from the fact that the plea states that "the defendant has enjoyed the aforesaid access for a continuous period of at least 30 years between 1957 and the date of its plea." This allegation is a conclusory statement that fails to detail the facts underlying it.

[60] As mentioned above, year 1935, also appears on the defendant's plea as the year upon which the defendant claims that it accessed the portion of the farm. For instance, if the court accepts the inception date of the personal servitude as 1935, it will then mean that the lifespan of the personal servitude would probably end in 2035. In fact, the circumstances of the two sets of dates that appear in the plea muddies the inception date issue more.

[61] It is crucial that a claim based on personal servitude through acquisitive prescription must be pleaded with specificity. This is so because, the dates mentioned, the words used, and their connotation are a vital feature in any evaluation of the claim. Thus, the allegations made should set forth facts sufficient to inform the other party of the claim it is facing. In other words, the defendant in this case, must allege sufficient facts so that the plaintiffs are reasonably aware of how the defendant managed to attain the personal servitude right he claims upon their farm. This obligates a party making a claim to plead all material facts applicable to its claim.

[62] Evidently, a claim of a right of personal servitude based on acquisitive prescription must amongst others, on its face, specifically identify the location of the servitude, the type of the servitude claimed, how the servitude came into being, when did the servitude commence and who is claiming the servitude.

[63] What is more, in the case of *Ardconnel Investments (Pty) Ltd* (1988) 2 SA 12 (A), it is stated *inter alia*, that it is the registration of the servitude in the title deed of the servient tenement that constitutes the servitude in law.

[64] Given the fact that the defendant failed to plead the "inception date" nor allege facts supportive of that; the question then is, what date is the "inception date"?

[65] Further, it is also not clear from the defendant's pleading why the year 1957 is specifically chosen or decided upon. A fair reading of the defendant's plea compels the conclusion that the year 1957 appears to be a random selection to calculate the 30 years of use and access [for purposes of acquisitive prescription]. This is so because, the defendant's plea reveals that for some time prior to 1957 the defendant claims to have had use and access to a portion of the farm.

[66] In deciding the inception date of the personal servitude, the 30 year period calculated in terms of the Act, has got nothing to do with the inception date or the lifespan of the personal servitude. The period for acquisitive prescription is a separate concept from inception of personal servitude.

[67] Obviously, the date of acquisitive prescription occurs subsequent to the inception date of the personal servitude. Hence, the assertion made on defendant's behalf that it is plain from the pleading that the inception date is from 1957, creates more vagueness and confusion. It should be noted that the submission on its own reveals lack of clearness.

[68] It should be within the knowledge of the defendant to be able to state with clarity the inception date of the personal servitude, claimed by a juristic person and based on acquisitive prescription. In the circumstances, it is difficult to define or discern the inception date of the personal servitude.

[69] This is a typical case of imprecise pleading. It is not much of a stretch to imagine that imprecise pleading leads to trial by ambush. Hence, it cannot be allowed. In terms of our law, a party is not allowed to conceal material facts until the hearing of the trial. A party cannot wait until the trial is underway to reveal an unpleaded material factual averment.

[70] In this case, the absence of the words in the pleading evincing the inception date of the personal servitude, makes it unavoidable to conclude that the pleading is vague and embarrassing. This conclusion is fortified by the consideration of the plainly incorrect assertion made on defendant's behalf that the inception date of the personal servitude is between 1957 and the date of the plea.

[71] It must then be accepted that the pleading in its current form, causes even the defendant to conflate the dates, as it is ambiguously worded. The question then is which date is the date of inception. In the circumstances, it is little wonder that Mr de V La Grange, on plaintiffs' behalf, posed a proper question during his oral submission as to how would a court determine when the alleged right lapses.

[72] In the circumstances, the plaintiffs would be left to speculate as to the inception date of the personal servitude. In light of the authorities cited by the plaintiffs, it is evident that the inception date is the factual and legal basis for the claim of personal servitude. Even more so, in the circumstances of a counter claim where it is alleged that the occupation of the defendant is unlawful.

[73] Clearly, in this case, the plaintiffs would not be able to respond properly to the defendant's counter claim.

[74] With all intents and purposes, where particulars of a claim are necessary; full, and sufficient particulars of the claim, including dates if applicable, should be stated in the pleading. It was contended on defendant's behalf that the plaintiffs are free to apply for further particulars should it require such.

[75] Undeniably, the plaintiffs should not be prejudiced in being able to respond properly to the pleading of the defendant's counterclaim. Likewise, it makes no sense that the trial should be further delayed by a further application for particulars that should have been in the first place contained in the pleading.

[76] Clearly, if the plaintiffs would be required to apply for further particulars and won't be able to properly respond to the pleading of the other party, that would attest to the fact that the defendant's counterclaim does not contain the necessary particulars of the claim.

Conclusion

[77] Looking at this matter, in my view it is self-evident that there is merit in the complaints raised by the plaintiffs. In the result, I am quite satisfied that the plaintiffs' exceptions ought to be allowed.

[78] The next issue I propose to address is whether in the circumstances, the defendant's counter claim stands to be dismissed. Notwithstanding these pleading deficiencies, I consider it appropriate that the defendant should be granted an opportunity to amend. After all, in great majority of cases where an exception is upheld a party is given leave to amend.

[79] I also conclude by expressing my sincere apology for the time that it took me to bring out this judgment.

[80] **On the basis of the aforegoing factors, I make the following order:**

1. The exceptions are upheld with costs;

2. The defendant is given leave to amend its counterclaim within 20 days of this order;

3. Should the defendant fail to amend its counter claim within the stated period, the plaintiffs are granted leave to apply on the same papers, duly supplemented, if necessary, for the dismissal of the defendant's counter claim.

NZIWENI, J

JUDGE OF THE HIGH COURT

APPEARENCES:

For the Applicant	:	Adv A de V La Grange
Instructed by	:	Du Bois Attorneys
Ref	:	Charles van Breda
For the Respondent	:	Adv F W Landman
Instructed by	:	STBB Smith Tabata Buchanan Boyes
Ref	:	AMcP/CLFWA201800