398 B

CALEDON DIVISIONAL COUNCIL v. MATTHEE AND OTHERS.

(CAPE PROVINCIAL DIVISION.)

1971. *March* 8, 9. 1973. *February* 13. VAN ZYL, J.

Land.—Farm bequeathed to nine heirs.—Two of the heirs taking transfer of their share.—Others not doing so.—Population of other heirs having multiplied.—Difficulty of Divisional Council in collecting taxes.—Application by notice of motion for relief and to define who of the "interested parties" were liable and for the division of the undivided portion amongst the interested parties.—Procedure unsuitable.—Determination of interested parties not a matter entrusted to the Divisional Council.—Divisional Council.—Powers of.—Order as to who is liable to taxes.—Council entitled thereto.

T and his wife had in 1809 bequeathed a farm to nine persons, two Whites and seven slaves and female slaves. Two of the heirs had taken transfer of their portion: the remaining heirs had not taken transfer and accordingly remained the owners of the undivided portion. At present there are 47 Whites and 80 Coloureds who allege that they were the "interested parties" of the undivided portion of the farm. The total population of the undivided portion was 627. As the applicant experienced difficulty in determining which persons were responsible for taxes, it applied on notice of motion for an order that the Court should (1) declare which of the Whites and Coloureds were "interested parties"; (2) declare what the undivided

399

portion was to which each of the interested parties was entitled; (3) make a division between the Whites and Coloureds; and (4) define to which portion each interested party is entitled. Forty of the "interested parties" supported the applicant and they had prayed for further relief, namely, that the remainder be divided and an order in regard to water rights of the Coloured interested parties. These "interested parties" had made also a counter-application for division on a different basis. The Court had ordered that service be effected by advertisements in newspapers and by the passing of the notice in public places to which it was to be expected that the interested parties might come. At the hearing certain objections *in limine* were taken; namely; (*a*) that the application disclosed no cause of action; (*b*) that the applicant had no *locus standi* to apply for any of the relief prayed for; (*c*) that all possible interested parties were not before the Court; and (*d*) that motion proceedings were unsuitable to decide the case.

Held, as to (*a*) that from the manner in which the facts had been set out it could be inferred that the phrase "interested parties" was used to indicate who the different persons were who were liable for taxes under sections 84 and 97 of Ordinance 15 of 1952 (C). Objection therefore overruled.

Held, in regard to (*b*), that the mutual differences of the interested parties were not matters in which the applicant had any say: they were not matters which fell within the legislative authority and executive power of the applicant or which were entrusted to its administration. Objection therefore sustained as against the applicant.

Held, further, that the right should be extended to the 40 interested parties to proceed to trial.

Held, in regard to (*c*), if it appeared at the hearing of the above-mentioned action that there were interested parties who had not had notice, that they could be given notice later and joined as parties to the action.

Held, in regard to (*d*), that motion proceedings were unsuitable for a decision of this case.

Application for the division of a farm and further relief. The facts appear from the judgment.

A. P. Burger, S.C. (with him J. P. van Niekerk), for the applicant.

400

C. B. Prest, for certain respondents.
T. E. Kleynhans, for certain respondents.
G. D. Griessel, for certain respondents.

Cur. adv. vult.

Postea (February 13th).

VAN ZYL, J.: This application for the division of the farm Hartebeesrivier in the Division of Caledon, on notice of motion, is made by the Caledon Divisional Council. This farm, in extent 2 596,0166 morgen and which was valued at R156 850 in 1969 for Divisional Council purposes is generally known as Tesselaarsdal and is also in this judgment referred to as such. The farm is registered in the name of the estate A. Huizenburg under title deed 170 of 1841.

According to the supporting affidavits by the secretary of the Divisional Council and a senior State health inspector, Johannes Jacobus

Tesselaar and his wife Aaltjie bequeathed the farm in 1809 to nine persons, two Whites and seven slaves and female slaves. Two of the heirs had taken transfer of their portions and these portions were later transferred to their "descendant". The remaining heirs did not take transfer of their portions and accordingly remained the owners of the undivided portion of the farm, presently known as Tesselaarsdal.

From the papers it is not clear who succeeded the heirs as owners. According to the affidavit of the secretary of the Divisional Council there are presently 47 Whites and 80 Coloureds who aver that they are "interested parties" in the undivided portion of the property. A list of names and addresses of these two classes of interested parties is attached to the affidavit. The secretary says that the Whites aver that they became interested parties

"in pursuance of the fact that they are either descendants of the original owners, Johannes Jacobus Tesselaar and his wife Aaltjie Tesselaar or acquired the rights from descendants by way of purchase, marriage or bequest".

On the same ground here are 80 similar non-White "interested parties". The Secretary says that the list was compiled by the alleged "interested parties" themselves and was handed by them to the Divisional Council as a list of the "interested parties" who are liable for Divisional Council tax.

From the affidavit of the health inspector it appears that in the course of time Tesselaarsdal was divided in three areas, viz., "Elandskloof", also known as "Solitaire" which consists of widely spread farms; "Biedouwskloof" which, except for three White dwellings, is occupied by Coloureds; and the third area which is more specifically known as Tesselaarsdal and which "forms the centre of the Coloured settlement". In the two predominantly Coloured areas there are approximately 100 dwellings which are described by the inspector as follows:

"In construction the dwellings vary from poor mortar brick hovels without adequate ventilation and lighting to single brick buildings with reasonable ventilation."

In this area no provision is made for water for domestic use. In the Tesselaar area the inhabitants—507 of them—draw their water from

401

an open furrow running through the "settlement" and which is exposed to pollution by humans and animals. The source of the water is also not protected against pollution. The inhabitants of Biedouwskloof previously obtained their water from a source on Mr. Milne's farm, portion of the farm Tesselaarsdal. This concession has recently been withdrawn and they now get their water from a marsh running between Biedouwskloof and Tesselaarsdal. Samples from these sources had recently been analysed and it was found that the water is so contaminated that it is dangerous for human consumption. In these areas there is also no provision for the removal of night-soil and rubbish. Trading facilities in the areas are inadequate and unhygienic. According to a

survey by the Divisional Council the total population of Tesselaarsdal is 627, some of whom occupy on behalf of "interested parties".

For years it has been the practice of the "interested parties" to divide their liability for tax to the Divisional Council between them and to furnish a list to the Divisional Council of the persons liable for tax with an indication of the amount of tax for which each is liable. The tax on Tesselaarsdal is then collected by the Divisional Council according to this list. From time to time it, however, happened that persons whose names appeared on the list denied their liability to pay tax or simply failed to pay the tax. During the 22 years, 1948 to 1969, the Council could not, on account of its inability to identify persons liable to pay tax, collect a total amount of R400,12 tax. In order to cope with this type of difficulty the Council decided that from 1st January, 1965, tax would be collected from inhabitants "who were certified as interested parties by the two Local Area Representatives". In consequence hereof the Council now receives applications from persons who are not designated by the Local Area Representatives as "interested parties" to be acknowledged as such by the Council. Such applications normally involve the Council in long and complicated issues of fact. In view of the difficulty experienced to determine who the "interested parties" are and the size of the community at Tesselaarsdal, the Council avers that it is neither practical nor desirable to collect the arrear tax in the ordinary manner by selling the properties in execution. Such action, the Council says, would cause "a disintegration of a very large community" with the accompanying social disruption. The consequences of such action will effect the Coloureds in the community most severely on account of their position, their limited means and inadequate education.

In the papers practical difficulties experienced in regard to the identification of "interested parties and occupiers"; the determination of the portion of the property to which the person in arrear is entitled; the determination of the value and situation of improvements and the sale of undivided shares which can frequently only be described vaguely, are further discussed.

For these reasons the Divisional Council says,

"is it necessary that the portion to which each interested party or occupier is entitled be more fully and precisely described and registered in his name in the Deeds Office".

402

In conclusion it is alleged:

"If finality in regard to the rights of ownership can be reached, it will be possible for my Council to undertake a proper housing scheme."

On these allegations of fact the following relief is sought:

(*a*) that the Court will declare who the White and non-White interested parties in the farm Hartebeesrivier in the Division of Caledon, in extent 2596,0166 morgen, are;

(*b*) that the Court will determine what the portion is to which each interested party is entitled;
(*c*) that the Court will make a division between the White and non-White interested parties;
(*d*) that, in the absence of an agreement the Court will determine to which portion each interested party is entitled;
(*e*) that the Court will give directions for the service of the application;
(*f*) that the Court will order that any person who opposes this application will pay the costs of the suit.

On these factual allegations the applicant first approached the Court for directions in regard to the manner in which the notice of motion should be served on the interested parties. Directions had been given by the Court and the motion was served in terms thereof. In reply hereto 69 affidavits and two petitions were filed. In these affidavits a large number of respondents claim certain portions of Tesselaarsdal. The petitioners ask that the Registrar of Deeds be authorised to register a particular portion of Tesselaarsdal in the names of the petitioners in terms of sec. 47 of the Deeds Registries Act, 47 of 1937, as amended.

The hearing started at Caledon and after proof of service, the hearing of certain witnesses whose evidence is irrelevant at this stage and an inspection *in loco*, the proceedings were postponed to Cape Town to hear certain points raised *in limine* and objections against the procedure followed by applicant.

Mr. *Vivier*, who appeared for the following respondents:

G. S. Matthee
J. S. Roos
H. du Toit
J. P. T. Willemse
M. H. L. (Tiewie) Fourie
G. S. Badenhorst
G. J. Vermaak
C. Reynolds
P. J. Swart, De Hoek
Mrs. van der Bergh
N. Olwagen
C. J. Olwagen
J. S. Matthee (E. Matthee)
P. J. G. du Toit
M. M. Matthee
P. J. Swart, Sandvliet,

Mr. *A. P. Burger*, who appeared for the following 15 respondents:

H. A. du Plessis
L. Groenewald
Mrs. Dawid du Toit
C. H. F. Matthee
Mrs. P. Fourie
C. H. Matthee (E./Son)
J. Milne, Wolfgat
N. P. Nagerman
Miss G. W. Viljoen
P. F. Titus
W. D. Steward
E. Abrahams
S. D. C. Steward
H. H. Solomon
W. Henn,

403

Mr. *Prest*, who appeared for the following two respondents:

D. J. du Toit
D. L. du Toit,

and Mr. *Griessel* who appeared for the following two respondents:

A. J. Nel
D. J. Swart

raised the following points *in limine* and also the following objections against the procedure:

1. that the application does not disclose a cause of action;
2. that the applicant has no *locus standi* to make the application for any relief prayed for;
3. that all possible interested parties are not before the Court and any order which may be issued cannot be binding on those absent;
4. that motion procedure is not suitable for the decision of the present case.

Mr. *Kleynhans* who appeared for the following 40 respondents:

J. P. D. Carelse	Roy Carelse
H. M. Avontuur	Willem Carelse
S. P. Carelse	C. Julies
G. H. Carelse	Elizabeth Julies
James Carelse	F. Julies
William A. Carelse	Gabriel Julies
C. F. A. Carelse (S. P./Son)	Hendrik Julies (D./Son)
P. D. Julies (J./Son)	Henry Julies (P./Son)
Herman Julies	James Julies (J./Son)
James P. D. Julies	John R. Julies
German Julies	John Julies
Widow Hendrik Barends	Pieter Julies Jnr.
Piet Benjamin	Willie Julies (J./Son)
Jan Brikkels	John Maart
C. W. Carelse	David May
Est. Late C. F. Carelse	Mrs. H. Pheiffer
M. P. Carelse	Julies Pheiffer
Dorothy Carelse	Christiaan Smal
R. G. Carelse	Mrs. D. Valentine
Reginald Carelse	A. Wyngaardt,

supports the applicant's application and opposes both points *in limine* and the objections against the procedure. He avers further that as his clients apply for the division of Tesselaarsdal and each claims a portion of the farm, each of his clients is now an applicant in his own right with the right to proceed with the division suit. In addition Mr. *Kleynhans's* clients made a counter-application for the following relief, viz. an order:

"(i) which will effect the division of the remainder of the farm Hartebeesrivier and the farm Hartebeesvlei, situate in the Division of Caledon, between the White and Coloured interested parties, on the basis mentioned in paras. 16 and 17 of the affidavit by Henry Martin Avontuur, sworn to at Caledon on 6th February, 1971, read with the sketchmap, annexure 'F' to the said affidavit;

(ii) an order in terms of which the water rights of the Coloured interested parties in regard to the streams known as Elandskloofrivier and Hartebeesrivier on the said properties are reserved and defined;
(iii) which investigates, determines and defines the rights, if any, of the persons mentioned in para. 18 (i) of the said affidavit by Henry Martin Avontuur, as well as the rights, if any, of the persons who signed the affidavit, being annexure 'B' to the affidavit by Henry Martin Avontuur;
(iv) which grants alternative relief; and
(v) which orders any person who opposes the relief sought, to pay the costs; and that the said affidavit by Henry Martin Avontuur (record pp. 74 *et seq.*) and the affidavit by S. P. Carelse and others (record pp. 86 *et seq.*) will be utilised in support of this application".

The applicant opposes these points *in limine*.

As regards the first point *in limine*, viz., that the application does not disclose any cause of action, the opposing respondents aver that the applicant bases his application on the allegation that applicant must be placed in a position to levy taxes and to enforce payment thereof. This, they say, is no cause of action, because before applicant can claim to be placed in such a position it must aver and prove that it has the right to levy and collect taxes in respect of the farm, and such right is neither averred nor proved; in the prayers applicant only refers to "interested parties". They say, it is not at all clear whom applicant wants to include in the concept "interested parties" and whether the interests are of such a nature that they render the interested parties liable to tax in respect of the farm. They further say that "interested parties" can only be liable to tax if they are owners as defined in sec. 84 of the Divisional Council Ordinance, 15 of 1952, or if the owners, as defined in this section, failed to pay the taxes and the "interested parties" are substituted for the owners in terms of sec. 97 (3) of the Ordinance. This argument is formulated too widely. I am satisfied that from the particular formulation of the facts in this case it may be inferred that the concept "interested parties" is used to indicate the different categories of persons—owners, holders of servitudes, occupiers, lessees, etc. who are defined by secs. 84 and 97 as taxpayers. It is true that "interested parties" is such a wide concept that it may include persons who do not fall within the definitions of these two sections, but the mere fact that the applicant formulated his case too widely certainly does not mean that he did not state his case, i.e. that he did not disclose a cause of action. Up to the present stage of this case nobody has been prejudiced or embarrassed by the use of the broad description—"interested parties".

I now come to the second point *in limine*, viz., that the applicant has no *locus standi* to ask for the relief prayed for. This point is based by the opposing respondents on three different grounds, viz.:

405

(1) the allegations of fact relied on by applicant for the relief prayed for do not disclose a legal ground on which the applicant may obtain the relief sought;
(2) only joint owners have the right to claim division of the joint property; and
(3) applicant's interest in Tesselaarsdal is not of such a nature that applicant may ask for a declaration of rights as set out in the notice.

On analysing the prayers and the law it appears that grounds (2) and (3) are in fact only facets of the first ground, viz., that applicant did not prove that its interest in Tesselaarsdal is of such a nature of that it can enforce a division of the property among the joint owners.

Applicant bases his right to institute an action for division on the following facts: that applicant is the Divisional Council in whose area the farm Tesselaarsdal is situate and that applicant experiences difficulty in collecting the taxes in respect of Tesselaarsdal because it is difficult and sometimes impossible to identify the persons who are liable to pay these taxes. Mention was also made of unsatisfactory housing, water supply, rubbish removal, sanitation and trading facilities at Tesselaarsdal; the density of the population; and the possibility "if finality about the right of ownership can be obtained" that the Council some time in the future "may build a proper housing scheme". The facts set out in the last sentence are stated in a supporting affidavit in a way which creates the impression that the facts are intended to prove, firstly, how difficult it is to collect taxes and secondly that it would be expedient and beneficial to subdivide Tesselaarsdal among the joint owners or "interested parties" or "rightful claimants". From this series of facts no conclusion is reached in the application to the Court. The facts are stated, but how they entitle the applicant to ask for a division is not mentioned and the existence of such a right cannot readily be inferred from these facts. The difficulty experienced to identify the taxpayers of Tesselaarsdal and to collect the tax remains the only cause in applicant's application under this head. If applicant has the right to obtain the relief sought from this Court, it will have to originate from these difficulties.

In the first place applicant asks "that the Court should declare which of the Whites and Coloureds are interested parties" as regards Tesselaarsdal. As already said, "interested parties" must in the context of this application be understood as meaning, *inter alia*, persons who in the case of a subdivision will be able to prove a real right in respect of a portion of the farm. The race of the persons who have a real right in Tesselaarsdal has no relation to their liability to pay tax or the determination of the identity of taxpayers. The question of a person's race is always delicate and emotional. It may be of some importance in case of a subdivision when it comes to questions about which portion

of Tesselaarsdal must be awarded to which owner—on the basis that in case of a subdivision, endeavours must always be made to make

406

the most suitable subdivision and the race of the owners is one of the factors which must be considered in making a suitable award of the different portions to the different owners. There is no basis on which the Divisional Council can rely to request this Court to determine the race of the "interested parties" in Tesselaarsdal.

In the second place applicant asks:

"that the Court declares what the undivided portion is to which each of the interested parties is entitled".

Owners have the right to possess their property in undivided shares. They also have the right to terminate this joint possession at any time. An outsider who has no interest in the property owned jointly, cannot demand that the property be divided amongst the owners. See *Voet,* 10.3.1. Justification for this statement can be found in Van der Keessel's *Praelectiones* (1507) where he comments on *De Groot,* 3.28.6, which reads as follows:

"The obligations also have the effect that the joint ownership can be dissolved: to which the joint owners or joint possessors are always entitled, except where division is prohibited by will for a fixed period (a perpetual prohibition will, however, not be binding)."

Van der Keessel's commentary is:

"The obligations, etc., *De Groot* also bases the power to ask for a division of the common property on the obligation *quasi ex contractu.* If we, however, consider the question properly, the division is really requested in pursuance of a real right, because it is tantamount to the claiming of that portion of the joint property which a person owns and to such person the private law gives the authority to own that portion separately (in order to prevent quarrels arising from the joint ownership and, therefore, in the interest of the community)."

(Dr. *Gonin's* translation, p. 249).

An outsider has no right to interfere with the real right of another. This right obtains against everyone. Should the Divisional Council's claim, that the Court divide Tesselaarsdal amongst the joint owners, be granted, it would be an infringement of the right of ownership of each of the joint owners. Each joint owner is owner of Tesselaarsdal as a whole in proportion to his portion of the whole. By asking for a division the Council attempts to bring about an important change in the real rights of the joint owners. This the Council can only do if it can advance grounds which give it the right to interfere with respondents' real rights to the extent of enforcing a division of Tesselaarsdal on the joint owners. Where there are joint owners who are not registered owners the Council may find it difficult to determine who they are, but this difficulty does not give the Council the right to claim that each owner must relinquish his portion of the whole by the subdivision and to take possession and transfer of his separate portion. The Legislator also foresaw the possibility that Divisional Councils would experience difficulties in determining who the owners are on whom tax can be levied and from whom it can be collected and for this reason sec. 84 of the Ordinance defines owner for the purpose of levying and collecting pro-

perty tax and in sec. 97 provision is made to levy tax on certain users of property where the owner does not personally use it and pay the tax.

407

In the Ordinance there is no provision on which the applicant can rely to compel a person to declare his ownership and to take his property into his personal possession. The Ordinance is purposely so formulated that the owner's right to keep his ownership secret and the manner in which he may possess his property are not infringed.

Mr. *A. P. Burger*, who appeared for the applicant, submitted that it is in the public interest that Tesselaarsdal should be subdivided amongst the owners: there is a congestion of persons on the farm, mostly Coloureds and amongst them there are squatters and until the "interested parties" are identified it is almost impossible to take steps against the squatters. He also averred that public health requirements make it unavoidable that the Divisional Council should take steps in regard to water, sanitation, removal of rubbish and hygienic trade facilities. It is particularly in the public interest that the Council should take steps as a large number of "interested parties" is not in a financial position to finance an action for division. The object of the action, he said, is not to identify taxpayers, but to determine who the owners are; thereafter the Council can itself determine who the taxpayers are. The determination of the owners, Mr. *Burger* says, is important to the Divisional Council in various ways: for the preparation of the valuation roll it is necessary to determine who the owners are (sec. 51 of Ord. 26 of 1944); this information is also required to compile the voters list; in terms of sec. 3 of the Slums Act, 53 of 1934, the Council must be in a position to determine who the owner is in order to prohibit abuses; should the Council erect the intended housing scheme at Tesselaarsdal, the owners must be given notice before the necessary expropriation can take place; as Tesselaarsdal had been proclaimed a local area in terms of sec. 6 of the Divisional Council Ordinance, the Council may in certain circumstances, in terms of sec. 210 of the Ordinance, recover the expenses from the owner in respect of the removal of a public nuisance; in terms of secs. 9 and 10 of the Towns Ordinance, 33 of 1934, and sec. 196 of the Divisional Council Ordinance it is necessary that the Council should know the identity of the owner before a subdivision of property may be allowed or building plans approved. The Public Health Act imposes the duty on the Council to remove any public nuisance and to do that the Council must take steps against the owner. The application, Mr. *Burger* says, embraces much more than a mere search for taxpayers.

This interpretation is not sound. The Council founded its application on its need to determine who the owners are in order to identify the taxpayers and the portion of the tax on Tesselaarsdal for which each taxpayer is responsible. The Council's need to determine the owners of Tesselaarsdal, flowing from the above-mentioned Acts and Ordinances,

was never raised in the application. The existence of these requirements was mentioned for the first time in argument. There is no factual basis for these requirements. The Council has to cope with a large number

408

of "interested parties" and it was not proved by the Council at all that the Council is unaware of each alleged interested party's share or that the Council cannot obtain facts in the cases of some of the alleged interested parties by the necessary enquiries.

But let us accept and that it is impossible for the Council and other parties concerned to determine by reasonable investigation and enquiries who the owners are and what interest they have in Tesselaarsdal. Then the applicant bases its application on the allegation that the Divisional Council is the representative and protector of the inhabitants of its district—"representative and guardian of the inhabitants"—See *Brits Town Council* v. *Pienaar, N.O. and Another,* 1949 (1) S.A. 1004 (T) from p. 1016 to p. 1020 inclusive and the cases referred to on these pages. The applicant directs attention to the fact that there are 610 inhabitants on the farm, that 127 persons claim that they have an interest in the farm and that almost two-thirds of them—80—are poor and uneducated persons who are not in a position to undertake and finance an action for division themselves, and the Divisional Council brings this application as representative and guardian of these persons to assist them in obtaining a division of the farm. The attitude of the Divisional Council that it wants to assist the poor is laudable, but the interest which these persons have in Tesselaarsdal is not the type of interest of the inhabitants in respect of which the Council may act as their representative, and especially not as champion of one group against another group of inhabitants. It is also not the type of interest in respect of which the Council will normally act as guardian. Normally the Council does not act as guardian of rights of ownership of an inhabitant especially not where the protection consists of the Council assisting the person protected to prove rights of ownership against another inhabitant. The issues amongst the interested parties of Tesselaarsdal are not matters over which the Divisional Council has any jurisdiction; these are not matters falling within the legislative or executive powers of the Council or which were entrusted to its administration.

I, therefore, come to the conclusion that the Council has no *locus standi in judicio* to make this application. This does not conclude the case.

Mr. *Kleynhans*, who appears for the 40 respondents who support the Council's application, says that because his clients ask for a division of Tesselaarsdal and claim certain portions of the farm they thereby each become applicants with the right to proceed with the case for division. It is perfectly true that in an action for division there are no plaintiff and defendant or applicant and respondent. In an action for division

each party is both plaintiff and defendant. He is plaintiff for that which he avers is his portion and the liabilities which he claims from his joint owners, and a defendant in respect of those portions which his joint owners aver are their portions and the liabilities they claim from him. These 40 respondents now ask that the action for division be proceeded with and aver that it cannot be advanced against them that they have no *locus standi in judicio* because they are joint owners.

409

From a practical point of view, there is much to be said in favour of granting to these respondents the right to proceed with the case on condition that the further points *in limine* taken by the opposing respondents should not be sustained.

This brings us to the third point *in limine*, viz., that all possible interested parties are not before the Court and any order made cannot be binding on the absent parties. The applicant did not know and could also not determine who all "interested parties" were and approached the Court about the method of service of the notice of motion. The Court determined in detail how the documents should be served and particular attention was given to the question about how the documents should be served in order to ensure that all interested parties would receive notice. The service was effected by advertisements in the newspapers and by exhibiting notices in public places to which it was to be expected that the interested parties might come, and the notices were prepared and pasted in such a way that it would attract attention. "Interested parties" were, therefore, properly summoned to court. Interested parties who had not had notice could be given notice later and joined as parties to the action.

This brings me to the fourth point *in limine*, viz., that motion procedure is unsuitable for the decision of this case. In this regard the opposing respondents are correct. The involved issues of fact which will have to be solved in order to determine who are "interested parties", how the division must take place and which portion must be awarded to each one are not simple factual issues which can be decided without pleadings. In motion proceedings the parties are also not entitled to call witnesses. The Court alone has the right to decide who will be called as witness. Then there is also the position raised by Mr. *Griessel*. He appeared for A. J. Nel and D. J. Swart. He says that his clients had become owners of specific portions of Tesselaarsdal by prescription and that there can be no question that they are not joint owners. They should, therefore, not be parties to the action for division. They and their immediate predecessors bought the portions which they claim from descendants of the original testators, Johannes Jacobus and Aaltjie Tesselaar, and the first purchase had taken place less than 30 years before the present action was instituted. In motion procedure it is very difficult for these two opposing respondents to raise this defence without getting involved in the division issue, and such a development may

be a long and expensive process for them, but if the case is decided by trial action, the prescription defence can be raised by peremptory plea, and in view of costs it may be that the parties will have this plea tried initially and separately.

The supporting respondents brought a counter-application and this application also raises such a complexity of facts and issues that it can also not be heard on motion. It appears that most of these facts and issues can be dealt with in a trial case in which division is prayed for.

410

In view of this it is not necessary to deal with the objections raised by the opposing respondents against the counter-application.

The fourth point *in limine* is, therefore, sustained.

The question now arises what order the Court should make. Expenses were incurred to bring the parties before the Court and there are actual issues. In these circumstances the application is dismissed, but it is ordered that the notice of motion will stand as a summons in the case which the opposing respondents will bring for the division of the joint property.

The question of costs remain. The opposing respondents succeeded and they are entitled to costs. All the respondents filed affidavits on the merits and this was not necessary for the decision of the points *in limine*. The applicant proceeded without *locus standi* and followed a wrong procedure. The applicant acted in the interests of the poor inhabitants and in the circumstances it is only just that applicant pays the wasted costs.

The application is, therefore, dismissed. The notice of motion stands as a summons in the case which the 40 supporting respondents wish to institute. The applicant is ordered to pay the costs of the hearing at Caledon and Cape Town. The costs of the inspection *in loco* will be costs in the cause. The costs will not include any costs incurred by the opposing respondents in connection with the preparation and filing of the affidavits on the merits. As the question of costs was not argued leave is granted to any party who is dissatisfied with the order of costs to set down the question of costs for argument, in which case the question of costs will be decided *de novo*. Any party who wishes the question of costs decided *de novo* should give the other parties notice of his intention within three weeks after delivery of this judgment.

Applicant's Attorneys: *Jan. S. de Villiers & Son.* Respondent's Attorneys: *Prisman & Wilson*; *C. Brenner*; *Horn & Horn.*
