THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1325/2017

In the matter between:

ZULMIRA FEDELIA STOFFBERG NO	**FIRST APPELLANT**
NICOLAAS EUVERHARDUS	
PHILLIPUS STOFFBERG NO	**SECOND APPELLANT**
MARTHINUS STOFFBERG NO	**THIRD APPELLANT**
NICOLAAS EUVERHARDUS	
PHILLIPUS STOFFBERG	**FOURTH APPELLANT**
MARTHINUS STOFFBERG	**FIFTH APPELLANT**

and

THE CITY OF CAPE TOWN	**RESPONDENT**

Neutral citation: *Z F Stoffberg NO & others v City of Cape Town* (1325/2017) [2019] ZASCA 70 (30 May 2019)

Coram: Ponnan, Tshiqi, Van der Merwe and Schippers JJA and Eksteen AJA

Heard: 6 May 2019

Delivered: 30 May 2019

Summary: Prescription – acquisitive prescription of public outspan – requirements under s 2 of the Prescription Act 18 of 1943 – continuous possession for 30 years not shown – acts of possession not reasonably indicating possession as if owner.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Holderness AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Van der Merwe JA (Ponnan, Tshiqi and Schippers JJA and Eksteen AJA concurring)

[1] This appeal concerns the ownership of a farm situated near Melkbosstrand in the Western Cape known as Farm 77 (Baas Ariesfontein Outspan) and measuring 425,9081 hectares (the property). The respondent, the City of Cape Town (the City), is the registered owner of the property. It is, however, occupied by the appellants. The first, second and third appellants are the trustees of the Keert de Koe Trust. The fourth appellant, Mr Nicolaas Stoffberg, is the son of the fifth appellant, Mr Marthinus Stoffberg.

[2] Relying on the *rei vindicatio,* the City launched proceedings in the Western Cape Division of the High Court, Cape Town for the eviction of the appellants from the property. In the main, the defence of the appellants was that the fifth appellant had acquired ownership of the property under the Prescription Act 18 of 1943 (the 1943 Act). The issue in the appeal is whether that court (per Holderness AJ) rightly rejected the appellants' reliance on acquisitive prescription in respect of the property.

[3] The property had been designated a public outspan since at least 1832. A natural fountain on the property provided drinking water to the trekking farmers and their livestock, hence the name Baas Ariesfontein Outspan.

[4] During 1895 the fifth appellant's grandfather inherited two adjoining farms in the area surrounding the property. During 1903 he acquired another adjoining farm by way of a Crown Grant. Since then, the fifth appellant's grandfather farmed these three farms as a unit. This unit adjoined the property at its north-western corner. In or about 1938, the fifth appellant's father inherited these farms. He continued farming on them as his father had done.

[5] On 2 August 1946, the Governor-General of the Union of South Africa transferred the property to the Divisional Council of the Cape, the predecessor in title of the City, under Crown Grant No 78/46. The Crown Grant *inter alia* provided that while the property remains that of the Divisional Council or its successors in title, 'it shall not, without the authority of the Administrator of the Province of the Cape of Good Hope first had and obtained, be used otherwise than for purposes of outspanning . . .'.

[6] After he left school during 1947, the fifth appellant, who was born on 18 March 1931, commenced farming with his father on the aforesaid farms. The fifth appellant's elder brother Mr Herman Stoffberg subsequently joined him and his father, and the three of them farmed together on these farms until 1959.

[7] During 1959 the three farms were consolidated into one property. It was registered as Farm 80 and named Keert de Koe. In the same year, the fifth appellant and his brother purchased Keert de Koe from their father and it was registered in their names as joint owners in equal shares. The two brothers farmed together on Keert de Koe, and other farms jointly owned by them, until 1985. During that year these farms were, by agreement, divided between the two brothers and in this process Keert de Koe was allocated to the fifth appellant and registered in his name.

[8] The fifth appellant and his brother entered into a written lease agreement with the predecessor in title of the City in 1969. In terms thereof they jointly leased the property at an annual rental of R600. The lease took effect on 1 April 1969 and was to expire on 31 March 1976. I shall return to whether this was the first lease agreement in respect of the property entered into by the fifth appellant and his brother.

[9] A subsequent lease agreement in respect of the property with the fifth appellant and his brother, effective from 1 September 1977, expired on 31 August 1984. This was followed by a lease agreement in terms of which only the fifth appellant leased the property for a period of ten years with effect from 1 February 1985. This renewed lease agreement with the fifth appellant expired on 31 January 1995, followed by a further lease agreement for the period 1 August 1996 to 31 July 2001. Although each renewed lease agreement did not commence immediately upon the expiry of the previous one, the fifth appellant and his brother and later the fifth appellant, in each case continued to pay the rental in terms of the expired lease until the renewal.

[10] Upon expiration of the 1996 lease agreement, the fourth appellant had taken over the farming operations from his father. He decided not to enter into a further lease in respect of the property, as he had formed the view that the property belonged to his father.

[11] The wheels of the administration of the City turned slowly until 2007, when it launched the application for the eviction of the appellants from the property. That application was referred to trial. The appellants counterclaimed for an order declaring that the fifth appellant was the owner of the property. An alternative counterclaim, for compensation in respect of improvements to the property, was not persisted in.

[12] After hearing evidence, the court a quo concluded that the appellants did not prove that the fifth appellant had become the owner of the property. It consequently dismissed the counterclaim and granted the eviction order and ancillary relief sought by the City, with costs; but granted leave to the appellants to appeal to this court.

[13] The case of the appellants rested on the possession of the property by the persons that farmed successively on the farms that became the farm Keert de Koe. In order to show that such possession resulted in the fifth appellant acquiring the ownership of the property, they had to bring their case within the requirements of s 2 of the 1943 Act. That section provided:

‘(1) Acquisitive prescription is the acquisition of ownership by the possession of another person’s movable or immovable property or the use of a servitude in respect of immovable property, continuously for thirty years *nec vi, nec clam, nec precario*.

(2) As soon as the period of thirty years has elapsed such possessor or user shall *ipso jure* become the owner of the property or the servitude as the case may be.'

[14] The meaning of these provisions is well established. The continuous possession required by this section is the common law *civilis possessio*, that is, the physical detention of the thing (*corpus*) with the intention of an owner (*animus domini*). In addition that possession must be *nec vi, nec clam, nec precario*. *Nec vi* means peaceably. *Nec precario* postulates the absence of a grant on the request of the possessor. *Nec clam* means openly, particularly 'so patent that the owner, with the exercise of reasonable care, would have observed it'. In *Bisschop v Stafford* 1974 (3) SA 1 (A) at 8D-F, Jansen JA said the following with reference to the judgment in *Malan v Nabygelegen Estates* 1946 AD 562:

'In *Malan*'s case, *supra,* the Court, however, went further than merely deciding the matter of *precario*; in order "to avoid misunderstanding" it also said:

". . . mere occupation of property '*nec vi nec clam nec precario'* for a period of thirty 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 a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as lease or usufruct which recognizes the ownership of another".

This appears, in effect, to be a reference to the Roman law requirement, as understood to-day, of *civilis possessio* for the acquisition of ownership, and *quasi possessio* for the acquisition of rights.'

Therefore 'adverse user' does not constitute an additional requirement but refers to the element of *civilis possessio* (in the case of acquisition of ownership). The onus rests on the party that relies on acquisitive prescription, and the continuous period may include possession by the predecessors in title of that party. See *Welgemoed v Coetzer & others* 1946 TPD 701 at 710-713 and 720-721; *Bisschop v Stafford* at 7H-9D.

[15] Having been designated as a public outspan, the property was subject to what is known as a public servitude. Public servitudes are created for the benefit of the public. A public servitude allows the public to use the land in a specified manner without the permission of the landowner. With reference to *Paarl Municipality v The Colonial Government* (1906) 23 SC 505 at 524, counsel for the City submitted that 'strong adverse measures are necessary' to establish acquisitive prescription in respect of land subject to a public servitude.

[16] To the extent that it might have been intended to convey that a more onerous burden is placed on a party asserting acquisitive prescription in respect of land subject to a public servitude, I cannot agree. In *Paarl Municipality* the plaintiff claimed that it had acquired by prescription, Crown land set apart as a public outspan. Hopley J came to the conclusion that a public outspan was inalienable until the passing of the Cape Act 41 of 1902. He proceeded to say at 524:

'If, however, I hold too strong a view on this point, and if, as was argued, an outspan is in no better or more protected position than a public road under common law, which, on the authority of Voet, may be lost to the public by continual adverse user, suffered without protest for the period of prescription (*Voet* 13. 7. 7), still in that very passage he shows what strong adverse measures are necessary to exclude the public from its right, and I am strongly of opinion, as I shall presently show, that no adverse acts of such a nature ever took place with regard to this particular public right.'

[17] The relevant passage of Voet (*Gane's* translation) reads:

'If a person has used a public road as his own property, has built upon it, sowed, planted, dug or put up fences upon it, or been in any other way whatever a hindrance to the people's passing that way, and a space of forty years has flowed on from that time without the people's objecting or vindicating the use of the road, no one, as I consider, will doubt that the people in that case have also lost the use of such public road by prescription, since no private or public right, which has been wiped out by a continual silence of forty years, can thereafter be set up on any cause or in any person whatsoever.'

It appears to me that the nature of the possession referred to by Voet is no different to that contemplated by s 2 of the 1943 Act.

[18] A party claiming ownership of land under the 1943 Act has to do no more than show on a balance of probabilities that he/she and his/her predecessors in title had *civilis possessio* of the land *nec vi, nec clam, nec precario* for a continuous period of 30 years. When the court determines that claim, however, the nature of the property and the type of use to which it was put would be important considerations. See *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd & another* 1972 (2) SA 464 (W) at 468A-B.

[19] It appears from what I have said that between approximately 1947 and 1959, acts of possession in respect of the property were performed jointly by the fifth

appellant, his father and his brother and thereafter jointly by the fifth appellant and his brother. It is thus not at all clear to me that the fifth appellant could lawfully claim exclusive possession of the property during this period. There are also several indicators that the fifth appellant did not regard the property as his own and that he only made use thereof without the consent of the owner whilst he was not prevented from doing so. Foremost amongst these is the fact that he entered into the lease agreements in respect of the property. This appears to be irreconcilable with a genuine belief that he owned the property. In the light of the conclusions that follow, it is not, however, necessary to make a final decision on these matters.

[20] The appellants pleaded that the property had continuously been in the possession of the Stoffberg family since the fifth appellant's grandfather acquired the neighbouring farms in 1895. However, only the evidence of the fifth appellant was presented in this regard. He naturally could only testify about what he remembered. He said that his earliest recollection dated back to when he was seven or eight years old. On the basis of this evidence the period of prescription commenced during 1938 at the earliest.

[21] It goes without saying that the period of prescription had to be completed before the first lease agreement in respect of the property was entered into. In his evidence, the fifth appellant spontaneously recalled that a rental of £200 per annum had been payable in terms of the first lease agreement entered into after the City's predecessor in title asserted its ownership of the property. Although the fifth appellant also said that he thought that this took place after the death of his father (his father died in 1963 but the fifth appellant could not recall that), he later said that he could not remember whether that had been the case. It is quite understandable that the City was not in possession of records of its predecessor in title dating that far back.

[22] In my view there is no reason not to accept the evidence that the first rental was payable in pounds. Judicial notice may clearly be taken of the fact that the South African currency changed from the pound to the rand during 1961. The first lease agreement had thus been entered into by no later than 1961. It follows that the appellants did not show the requirement of continuous possession of the property for a period of 30 years. For this reason alone, reliance on acquisitive prescription had to fail.

[23] For the reasons that follow, I am, in any event, in agreement with the court a quo that the acts of possession of the property relied upon by the appellants either did not take place with the required *animus domini* or could not reasonably have been perceived as such by the owner or did not endure for 30 years prior to 1961 or even 1969. The appellants relied on three categories of acts of possession of the property. As I have said, there is no evidence that these acts took place prior to 1938. They are: (a) the cutting of firewood for the sale thereof; (b) the grazing of sheep and the erection of sheep kraals; (c) the clearing of land and the cultivation of crops.

[24] The evidence of cutting of wood on the property for purposes of the sale thereof, is sparse in the extreme. Wood was also obtained on other land in the area. There is no evidence of the duration or frequency of this activity. This is hardly proof of possession of the property with *animus domini* and could certainly not reasonably be regarded as such.

[25] According to the fifth appellant's earliest recollection, there were no boundary fences in the area. Sheep of the fifth appellant's father, as well as of his uncle, grazed on the property and on a neighbouring farm known as Wolwerivier. Grazing was available on the property only during winter. There is no evidence, however, that the sheep grazed on the property for the duration of the winter. Similarly, there is no evidence as to when the sheep kraals were constructed nor that they were intended to be permanent structures. On the evidence, the grazing of sheep on the property may very well have been sporadic. Sporadic grazing was entirely consistent with the use of the property as a public outspan and would not reasonably indicate use of the property by a particular person as if he was the owner thereof.

[26] A careful reading of the evidence of the fifth appellant indicates that the clearing of portions of the property for purposes of cultivation of crops only commenced after he left school during 1947 and gained momentum when a tractor was acquired during approximately 1952. Thus, prescription based on these acts of possession would not have been completed by 1961 or even by 1969.

[27] For these reasons the appeal cannot succeed. It is not disputed that the employment of two counsel was justified. In the result the appeal is dismissed with costs, including the costs of two counsel.

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C H G van der Merwe

Judge of Appeal

APPEARANCES

For Appellants:	J D de Vries Instructed by: De Kock & Co Inc, Melkbosstrand J G Botha Attorneys, Bloemfontein
For Respondent:	J Muller SC (with him E van Huyssteen) Instructed by: Fairbridges Wertheim Becker, Cape Town McIntyre & Van der Post, Bloemfontein