



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case no: 35735/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Signed: Date: 21 February

In the matter between:

HASSODY KATHA

Plaintiff

and

PRIMATHIE PILLAY N.O.

First Defendant

KANDERUBY RAMOOTHY N.O.

Second Defendant

MASTER OF THE HIGH COURT, JOHANNESBURG

Third Defendant

JUDGMENT (LEAVE TO APPEAL)

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy to Caselines.

MOULTRIE AJ

- [1] The plaintiff seeks leave to appeal against the judgment and order delivered in this matter on 21 August 2023, in which I upheld the first and second defendants' special plea to the plaintiff's main claim of acquisitive prescription, and dismissed Claim A as pleaded in the plaintiff's amended particulars of claim. The first and second defendants filed a notice indicating that they abide the court's decision on leave to appeal.
- [2] I note that the surname of the plaintiff and the deceased was incorrectly spelled on the CaseLines file, which led to the misspelling of her surname in the judgment. I have corrected the spelling in this judgment.
- [3] In deciding whether to grant leave to appeal, I am required to apply the provisions of section 17(1) of the Superior Courts Act, 10 of 2013. The plaintiff relies on both subsections 17(1)(a)(i) and 17(1)(a)(ii), which stipulate that leave to appeal may only be granted where the court is of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
- [4] The plaintiff advances a wide range of grounds of appeal, challenging my conclusion that the death of an owner against whom prescription is running constitutes "superior force" as contemplated in section 3(1)(a) of the 1969 Prescription Act, and which is an impediment that only ceases to exist upon the appointment of an executor with the result that it could (depending on when the executor is appointed) potentially operate to delay the completion of the period of acquisitive prescription. The plaintiff also challenges my alternative finding that the death of the owner is an impediment under the common law which suspends the running of acquisitive prescription until such time as an executor is appointed.
- [5] All of the grounds advanced in the application for leave to appeal have in common the contention that the effect of my conclusions would potentially have the result of "perpetuating an existing condition of uncertainty" by allowing an "indefinite" delay in the completion of acquisitive suspension or an indefinite suspension of the prescription period. It is contended that this would potentially

undermine one or both of the justifications historically advanced for the existence of acquisitive prescription in our law as identified in paragraph 28 of my judgment.

- [6] While it is correct that the implication of my findings of law is that a delay in the completion of the prescription period or its suspension will indeed be “indefinite” in the sense that the date of completion is indeterminate as at the date of the owner’s death, it seems to me that this is no different from the other recognised impediments envisaged in section 3(1)(a), as well as that in section 3(1)(b). Many of these impediments are also recognised at common law. The advent of all of these impediments would result in similar indeterminacy. Many of them could result in the delay of the completion of prescription (i.e. under the Act), or suspension of its running (i.e. at common law), until after the death of either the owner or the possessor.
- [7] In his oral submissions, however, Mr Karolia argued that what distinguishes the death of a person from these other scenarios is that it is possible that an executor is never appointed, whereas in the other scenarios there will at some (indeterminate) future date be finality on the question of whether acquisitive prescription has taken place. In other words, the concern is not so much one of indefiniteness but one of potential permanence.
- [8] As I noted in paragraph 25 of the judgment, compliance with one or other of the jurisprudential justifications that have historically been advanced for the existence of acquisitive prescription in our law does not form part of the substantive requirements for its operation. In any event, it seems to me that the postulated scenario of permanent delay or suspension is highly unlikely to arise in practice, and I do not think that its remote possibility is of such significance as to outweigh the countervailing constitutional concerns identified in paragraph 31 of the judgment.
- [9] Be that as it may, given the very nature of the balancing exercise that the decision necessarily involved in the absence of clear and binding authority governing the question at issue, I cannot but accept that there is at least a prospect that another court might reach the opposite conclusion. Indeed, a single judge in another division did so in *Minnaar v Rautenbach* [1999] 1 All SA 571

(NC) – albeit only in relation to the 1943 Prescription Act, which does not apply to the current matter. I am furthermore mindful that the first and second defendants did not oppose the application for leave to appeal. Leave to appeal should therefore be granted.

[10] In view of the *Minnaar* decision, I consider it appropriate that leave be granted to the Supreme Court of Appeal, so that any further uncertainty on this issue may be put to an end.

[11] I make the following order:

1. Leave to appeal to the Supreme Court of Appeal is granted against the whole of the judgment and order delivered on 21 August 2023 under case number 35735/2018.
2. The costs of the application for leave to appeal shall be costs in the appeal.

RJ MOULTRIE AJ

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

DATE HEARD: 17 November 2023

JUDGMENT: 21 February 2024

APPEARANCES

For the Applicant (Plaintiff): M Karolia instructed by DP Attorneys
Inc.

For the 1st & 2nd Respondents (Defendants): No appearance