ORIGINAL

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D3519/2021

In the matter between:

DHANWANTHIE GIANCHANDI	**APPLICANT**
and	
REGISTRAR OF DEEDS, PIETERMARITZBURG	**FIRST RESPONDENT**
MOSELEY PARK ESTATES (PTY) LTD	**SECOND RESPONDENT**
ETHEKWINI MUNICIPALITY	**THIRD RESPONDENT**

JUDGMENT

Nicholson AJ:

[1] The Applicant seeks declaratory relief in terms of s 1 of the Prescription Act 68 of 1969 ('the Act') in light of her being in occupation of immovable property described as Erf 107, Moseley Park, Ext 1 (Pietermaritzburg), Province of KwaZulu-Natal ('the property') for a period exceeding 30 years.

[2] The Applicant seeks further ancillary relief in terms of s 33 of the Deeds Registries Act 47 of 1937 that the property be registered in her name.

[3] The First Respondent, has not participated in this matter at all, while the Third Respondent, while not opposing the relief sought, has filed an answering affidavit wherein they describe certain illegalities with regards to the property, that shall be dealt with hereinbelow.

[4] The relief sought by Applicant is opposed by the Second Respondent, the registered owners of the property.

Background Facts

[5] The Applicant contends that on or about April 1990, her late husband and herself purchased a house 3 houses away from the property.

[6] During this time, she noted the property was undeveloped and deserted. She and her family then made several improvements to the property and transformed it into a nursery and community park. The park is now open and accessible to members of the community.

[7] In order to obtain electricity and water for the nursery, the Applicant states that they utilised the water and electricity from the neighbours for which they reimbursed the neighbours.

[8] Further, the running costs of the park is approximately R16 000 per month and the improvements of the property to date is approximately R950 000. The revenue of the park and nursery is used to maintain the park.

[9] The Applicant states further that since there had been in occupation of the property for a period of 31 years, (at the time of bringing this application), she thought it would be prudent to regularise the ownership of the property into her name. Accordingly, she consulted with an attorney.

[10] The Applicant states further that at all times over the past 31 years, she exercised her possession openly, and she possessed the property with the intention to possess and control it, as owner.

[11] The Applicant further contends that her attorney of record established the registered owners of the property as Moseley Park Estates (Pty) Ltd ("Moseley Park Estates"), who had been deregistered between 16 July 2010 and 15 September 2020, and have not approached the Applicant in any way regarding their occupation and use of the property.

[12] Ms Sandra Pillay, on behalf of Second Respondent, deposed to the answering affidavit in opposition to the relief sought by the Applicant, and states that she and her husband purchased Moseley Park Estates in or about 1993 and became directors on 9 July 1993, and Second Respondent currently owns 39 plots of land in the Moseley Park area which includes the property in question. However, she does not state exactly when Second Respondent became owner of the property.

[13] The reason they purchased Moseley Park Estates was to develop the plots of land and sell the developments. Further, most of the 39 plots are undeveloped and covered in dense vegetation and are without services such as water and electricity. Ms Pillay states further that in consequence of financial constraints, Moseley Park Estates was deregistered in 2010 and re-registered in 2020.

[14] Ms Pillay confirms that neither she nor her husband approached the Applicant because the nursery is not visible when they drive past the property and only recently became aware of the nursery on the property. They initially assumed that the nursery was situated on a neighbouring property.

[15] I pause to mention here that Ms Pillay does not provide any details of when and why the property was visited save to say that the nursery is not visible from the road.

[16] Ms Pillay states that they deny the Applicant has been on the property for 31 years because: the Applicant has failed to put up any proof in her affidavit that evidences possession of this period, and the Municipality had provided two aerial photographs dated 2019 and 2020 which shows that a

large amount of vegetation had only been cleared and a tarred driveway built in 2020. Accordingly, occupation of the property only started in 2020.

[17] Ms Pillay further states that the applicant did not possess and control the property as owner because, unlike what one would expect of an owner, the Applicant:

(a) connected both illegal electricity and a water supply to the property;

(b) did not apply for a legal water and lights connection to the property;

(c) used the property illegally because it was zoned for public open space; and

(d) did not make an application to the Municipality to use the property as a nursery.

[18] In the Applicant's replying affidavit, it emerged as common cause that the water and electricity was indeed connected illegally; the Applicant did not apply for the appropriate zoning of the property; and while vegetation had been cleared out between 2019 and 2020, occupation of the property was in fact 31 years prior.

[19] It is instructive to mention at this point that the eThekwini Municipality filed an answering affidavit wherein they confirmed that there had been no application for the use of the property, rezoning of the property, and the water and electricity connection was indeed illegal.

Legal requirements for acquisitive prescription

[20] Section 1 of the Act reads:

'Acquisition of ownership by prescription – Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which

he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.'

[21] Amler's precedents of pleadings[1] states:

'A party claiming acquisitive prescription of a movable or immovable object must allege and prove:

(a) civil possession – that is, possession with the intention to possess and control as owner...

(b) possession for an uninterrupted period of 30 years or for a period which, together with any period for which the thing was possessed by any predecessors in title, constituted an uninterrupted period of 30 years...

(c) that possession was exercised openly...

(d) adverse user (this element is probably the same as the first element).'

[22] In terms of section 4(1) of the Act the running of acquisitive prescription is interrupted by the service on the possessor of any process whereby any person claims ownership of the property in question. The applicant instituted the present application on 26 April 2021 and service on the various respondents was effected on 4 May 2021, 9 June 2021 and 17 August 2021.

[23] It follows that if possession of the kind required in terms of s 1 of the Act, was exercised by the Applicants and their predecessors for a period of at least 30 years prior to 17 August 2021, the respondents would be the owners of the property by acquisitive prescription. This would require that such possession should have begun to be exercised by August 1991 at the very latest.

[24] The critical requirement in the present case is encapsulated in the phrase "possessed openly and as if he were the owner thereof" in section 1[2]. The possession contemplated in section 1 is what is called civil possession and such possession has an objective and a subjective element, namely, physical

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[1] Ninth Edition at 303.

[2] Morgenster 1711 (Pty) Ltd v De Kock NO & others [2012] JOL 28477 (WCC), para 14

possession coupled with *animus domini*[3]. The mental state of possessing as if one is the owner covers both the *bona fide* possessor and the *mala fide* possessor. This means that possession in the bona fide but mistaken belief that one is the owner suffices[4]. The fact that the person would not have had that state of mind if he had known the true facts is irrelevant[5].

[25] The onus rests with Applicant, as the person asserting ownership by acquisitive prescription, to prove the requirements directed in section 1 of the Act[6].

Argument

[26] In argument, Ms *Jaipal*, on behalf of the Applicant, submits that the Applicant has complied with all the elements of s 1 of the Act because she had been operating a nursery and community park openly on the property at her own cost since 1990.

[27] She states that although only eight hundred (800) square meters of the property were used for the nursery, the remaining property is used as a park and to store trees and other various initiatives.

[28] The Applicant was unable to apply for the necessary water and electricity connections but paid for the water and electricity that she used.

[29] Various neighbours of the Applicant confirmed, by way of confirmatory affidavits to the replying affidavit, that the Applicant had been using and occupying the property openly, with one of the neighbours confirming that he resided in the area longer than 31 years, and confirmed that the Applicant has been using the property as a nursery and park for the period of 31 years.

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[3] see Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd & another 1972 (2) SA 464 (W) at 474B–C and cases there cited; Glaston House (Pty) Ltd v Cape Town Municipality 1973 (4) SA 276 (C) at 281D–F; Pienaar v Rabie 1983 (3) SA 126 (A) at 134A–D

[4] Morkels Transport, supra, at 474E

[5] Morgenster 1711 (Pty) Ltd, supra, at para 14

[6] see Bisschop v Stafford 1974 (3) SA 1 (A) at 9D–H; see also Du Toit & others v Furstenberg & others 1957 (1) SA 501 (O) at 503E–F

[30] With regard to the photographs, Ms *Jaipal* admits that the Applicant had only done some development between 2019 and 2020 on the property but denied that this means that they were not in occupation of the property for the last 31 years.

[31] Ms *Holtzhausen*, on behalf of Second Respondent:

(a) denied that the Applicant occupied and possessed the property openly because the nursery and park were not visible from the road and were hidden behind the thick vegetation;

(b) denied that Applicant could not have occupied the property for 30 because the aerial photographs from the municipality showed that the development on the property only took place between 2019 and 2020; and

(c) the Applicant used the property illegally by: illegally connecting the water and electricity; failing to apply for the rezoning of the property and the use of the property as a nursery without the necessary authorisation.

Dispute

[32] In the circumstances, the disputes between the parties appear to be threefold:

(a) Did the Applicant occupy the property for a period of 30 years with the intention to possess and occupy as owner;

(b) Does occupation of the property in circumstances where the electricity and water connections are illegal, and without the proper authorisation to use the property as a nursery, mean that her possession can be construed as possession for the purposes of the Prescription Act; and

(c) Applicant only possessed a small portion of the property.

Analysis of the facts and law

[33] With regard to the illegal use of the property, and the illegal electricity and water connection, Ms *Holtzhausen* drew the court's attention to *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A) where the court refused to confirm ownership on a property occupier despite the Applicant being on the property in excess of 30 years; because the Applicant's occupation thereof was in contravention of s 38 of Transvaal Gold Law Act 35 of 1908 (T), which prohibited the use of the surface of the ground held under mining title, not the possession thereof.

[34] The Appellate Division reasoned that the Transvaal Gold Law Act placed a restriction on the occupation and use of the land held under the mining title, and since possession which is required for acquisitive prescription, is tied to the occupation and use of the land, which is illegal in terms of the Transvaal Gold Law Act; ownership cannot flow from an illegal possession. The court[7], however, concedes that there may be cases where possession was intertwined with illegal acts but for the purposes of prescription, the possession may be separated from the illegality.

[35] The facts of this matter are however, distinguishable from *Swanepoel.* The matter at hand is not one where either ownership or the possession of the land is illegal. This is demonstrated by the fact that the Second Respondent owns the land and there is nothing in the Second Respondent's version that indicates that the requisite authorisations, if applied for, would not be granted.

[36] In the circumstances, the illegality of the water and electricity connection, the failure to apply for the requisite zoning and the use of the property as a nursery without the requisite authority, may be separated from the possession.

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[7] *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A) at 605D-E.

Possession as owner

[37] Apart from the 2019 and 2020 photographs referred to above, save for the Second Respondent's denial that the Applicant was in possession of the property for a 31-year period, the Second Respondent does not have any further evidence to support its denial of the occupancy period.

[38] On the other hand, the Applicant has put up various confirmatory affidavits that not only confirm the Applicant's possession of the property but also confirms the Applicant's use and open possession of the property, and the Applicant's possession over a 31-year period.

[39] Further, Ms Pillay confirms that she only took ownership of the Second Respondent in 1993 which is 3 years after the Applicant states that they took possession of the property. Ms Pillay further concedes that she was not aware of the Applicant's possession because the nursery and park was not visible from the road. Accordingly, Ms Pillay is unable to gainsay the Applicant's possession of the property over a 31-year period.

Extent of the possession

[40] In as far as the extent of the possession of the property is concerned, in *Morkels Transport*[8] Colman J held, that the test was whether:

"there was such use of a part or parts of the ground as amounts, for practical purposes, to possession of the whole"; and as to the latter, that it was sufficient that use was made of the property in question "from time to time as occasion requires..... [and] much depended upon the nature of the property and the type of use to which it is put."

[41] Following the reasoning in *Morkels Transport,* in *Morgenster 1711 (Pty) Ltd*[9], the court observed:

"The acts of use constituting the open possession need not have been exercised in relation to every part of the disputed area or with absolute continuity."

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[8] at 467H–468B
[9] supra, at para 17

[42] In these circumstances, considering that the property was used as both a park and nursery, the fact that Applicant used certain portions of the property infrequently, does not detract from Applicants possession.

[43] In the premises, I find that the Applicant's possession of the land complies with s1 of the Prescription Act and the constraint in *Swanepoel* for the property to be transferred to the Applicant does not apply to this property.

Condonation

[44] Second Respondent filed its Heads of Argument and Practice note, together with an application for condonation on the morning of the hearing, which is outside of the timeframes for the filing of these documents. It is trite that, while the court hearing the matter enjoys a wide discretion to either grant or refuse condonation, the Applicant must either show good cause for the late filing, or that it is in the interest of justice to allow the late filing.

[45] The reasons advanced in the condonation was the non-payment of fees by Second Respondent to its attorney of record, which caused the delay in briefing counsel to draft the heads of argument. This, is not good cause.

[46] Applicant on the one hand opposed the application, citing prejudice but on the other hand wanted the matter to proceed.

[47] Since Heads of Argument are meant to assist the court, I consider it in the interest of justice to allow the condonation so that the matter may proceed at Applicant's request.

Order

[48] I therefore make the following order:

(a) Second Respondent is granted condonation for the late filing of its practice note and heads of argument with no order as to costs.

(b) The rule *nisi* issued on 2 July 2021 is confirmed.

(c) The Applicant is declared the owner of the property described as: -
'Erf107, Moseley Park, Ext 1 (Pietermaritzburg), Province of KwaZulu-Natal.'

(c) The First Respondent is directed to register the Applicant's title in and to the property and furnish her with the title deed within 90 days of the date of this order.

(d) The Sheriff of the High Court with the requisite jurisdiction, is authorised and directed to sign all documents on behalf of the registered owner of the property to give effect to the orders set forth above.

(e) The Second Respondent is directed to pay the costs of the application.

NICHOLSON AJ

Date heard:	3 March 2023
Date of judgement:	14 March 2023
Parties:	
For the Applicant:	Advocate Jaipal
Instructed by:	Prathika Asrai and Associates 144 High Ridge Road Durban North Durban
For the Second Respondent:	Advocate Holtzhausen
Instructed by:	Keegan Govender and Associates Suite 6, Wearcheck House 16 School Road Pinetown