



**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case number: 8917/2019

In the matter between:

BURGLAR ALARM & REMOTE CONTROL

SERVICES CC

Plaintiff

and

WERNER BRITS

Defendant

JUDGMENT DELIVERED ON 7 FEBRUARY 2024

(delivered electronically via email)

VAN ZYL AJ:

Introduction

1. This is a dispute over a triangular strip of land along the common boundary of the respective parties' properties, visually marked by a wire fence that does not follow the cadastral boundary. The plaintiff alleges that it has acquired ownership of the strip of land – which is on its side of the fence - by way of acquisitive prescription. The defendant disagrees.
2. Acquisitive prescription is an original method of acquisition because the co-

operation or permission of the legal predecessor is not required to acquire ownership in this manner. A possessor acquires ownership automatically and *ex lege* the moment it satisfies all the requirements of prescription. Ownership is not dependant on the property first being registered in the acquirer's name in the Deeds Office.¹

3. Acquisitive prescription is regulated by the Prescription Act 18 of 1943, as well as the Prescription Act 68 of 1969. Since the parties' respective erven were created in 1971, the 1943 Act has no application. The 1969 Act which came into operation on 1 December 1970 applies. Section 1 provides that "*... 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.*"
4. The dispute arose around 22 March 2019. Since the relevant period for acquisitive prescription in terms of section 1 of the 1969 Act is 30 years, the question for purposes of the declaratory order sought by the plaintiff is whether the fence had been regarded as the boundary between the parties' properties for 30 years prior to the service of the summons on the defendant on 27 May 2019.² In other words, by the time the action was instituted, had the fence had been regarded as the boundary for long enough to have enabled the plaintiff and its predecessors-in-title to have acquired ownership of the strip of land between the fence and the cadastral boundary by way of acquisitive prescription?
5. In his plea the defendant denies that the plaintiff acquired the land in question by acquisitive prescription. The defendant seeks, by way of a counterclaim, an order that the plaintiff "*remove the encroachment and make good the land upon which it encroaches*". The question to be answered in relation to the counterclaim is whether the fence had been regarded as the boundary for 30 years prior to the delivery of the defendant's counterclaim on 27 June 2019.

¹ *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) at para [13].

² None of the factors postponing the running of prescription – referred to in section 3 of the 1969 Act – is present.

This is because the plaintiff is the party in possession of the land (it being on the plaintiff's side of the fence), and in terms of section 4(1) of the 1969 Act, prescription ran until interrupted by service of legal process claiming ownership of the land on the plaintiff.

6. The relevant evidence furnished by the parties is summarised below. The legal principles underpinning the determination of the dispute are canvassed thereafter.³
7. The plaintiff called four witnesses, namely Mr Leon Nabal, Mrs Martha Nabal, Mr Pieter Houterman, and Mr Otto Steinhofel. The defendant himself testified, and called two further witnesses, namely Mr Willen van der Merwe and Mr Ferdinand Cronje.

The parties' respective properties

Overview

8. The plaintiff and the defendant own adjoining properties on the Breede River, just south of Malgas. The properties are known, respectively, as erven 496 and 420 Malagas, and are situated on the Malgas/Infanta road. The bulk of each of the properties lies to the south of the road, with smaller portions on the Breede river to the north of the road.
9. The dispute between the parties arises from the fact that there is a difference between the real or actual boundary between their properties, and a barbed-wire fence which constitutes (and has, on the evidence, done so for many years) a visible, physical boundary between them. The real or actual boundary (the cadastral boundary) between the properties is an invisible straight line between two beacons which were surveyed in 1971 to mark the corners of the properties.
10. At the back of the two properties the wire fence coincides with the cadastral

³ Counsel for each of the parties provided heads of argument and helpful oral argument, for which the Court expresses its appreciation.

boundary. The fence starts at the rear corner beacon between the properties, which is marked by a railway sleeper. The fence then runs parallel and very close to - within a few centimetres of - a dwelling situated near the back of erf 496, the plaintiff's property.⁴ As the fence runs, which it does in a straight line, it deviates from the cadastral boundary at a rate of about 16mm per metre, and continues to do so for approximately 150m until it terminates at a fence post at the Malgas/Infanta road.

11. Where the fence ends at the fence post, at the corner of a low stone entrance wall marking the entrance to the plaintiff's property, it is about 2.5m from the cadastral boundary. From the drawings and photographs submitted into evidence, it is evident that the stone entrance wall⁵ (erected by the plaintiff, as well as the landscaping done by the plaintiff in front of the wall) on the western side of the driveway into the plaintiff's property is on the defendant's side of the cadastral boundary, and the fence post is on the western end of the western entrance wall. The fence continues on the other side of the road, terminating near the Breede river.⁶
12. The fence thus encroaches for its entirely length onto erf 420 (the defendant's property), cutting a long, triangular strip of land from the erf 420. The encroachment is imperceptible at first, but gradually becomes more pronounced as it continues onto the river side of the road.

Ownership of the plaintiff's property over the years

13. The ownership of the parties' respective properties over the years is not disputed. The relevant title deeds and land surveyor's diagrams were handed in as evidence.

⁴ The position of the dwelling on erf 496 makes it impossible for a fence to run exactly on the cadastral boundary, because a corner of the dwelling protrudes about 7cm into erf 420 at a point about 25m down along the boundary.

⁵ The plaintiff's property is also known as Diepkloof Farm, which is the name inscribed on one of the entrance walls.

⁶ It is not entirely clear from the counterclaim whether the defendant seeks an order also in relation to the portion of the fence on the river side of the properties, but the case was approached on the basis that the entire length of the fence (on both sides of the road) was in issue for purposes of prescription.

14. It is common cause that the plaintiff's property (erf 496 Malagas) was formed by the consolidation of two properties, namely erf 421 and erf 494 Malagas. Erf 421 had been surveyed and subdivided from erf 422 in 1971. Prior to 1971, erf 421 did not exist as a separate parcel of land.⁷
15. Regarding erf 421: the plaintiff led evidence on the successive ownership of erf 421 over the years. Erf 421 was registered in the name of Mr Jan Dawid Lourens in 1972 in terms of deed of transfer T6965/1971. In 1977 Mr Lourens sold and transferred the property to Mr Mervyn Lorraine Olivier.
16. By 1978, erf 421 had a structure on it near its south-western corner. The structure comprised various rooms, and one of its outer walls was close to and parallel with the boundary of what is now the defendant's property, erf 420. In February 1978 plans were approved to extend the existing structure on erf 421 to include further living areas. The extensions were to both the north and south ends of the existing building. The plan showed the edge of the house to be parallel to the boundary of the property. The extensions were subsequently built, although it is unclear exactly when that work took place. The wall on the north-western section of the extension, after it was built, protruded over the cadastral boundary and into what is now erf 420, by 7cm.⁸
17. In January 1989 Mr Olivier sold erf 421 to Mrs Martha Emmerencia Nabal, and it was transferred into the latter's name on 20 March 1989. The evidence (tendered by the plaintiff) of Mrs Nabal and her husband, Mr Leon Nabal, indicates that the extensions to the existing structure on erf 421 had been built well before 1989.
18. The plaintiff purchased erf 421 from Mrs Nabal on 14 October 1992, and took transfer of it on 9 February 1993. The evidence of the plaintiff's sole

⁷ A report dated 3 December 1969 regarding the proposed subdivision and the difficulty in finding beacons, prepared land surveyor H. J. Smal, was handed in, but does not take matters much further for the purposes of the relief sought in this action.

⁸ See footnote 4 above.

member, Mr Otto Steinhofel, was that the building was old, and that he renovated the interior.

19. As regards erf 494, the evidence was as follows: erf 494 was created as a portion of erf 487 in 1997. The plaintiff purchased erf 494 on 18 October 1999 from Mr Manfred Bleier and took transfer of it on 9 March 2000.

20. Erven 421 and 494 were thereafter consolidated to form erf 496 Malagas – the plaintiff's property.

21. As indicated earlier, erf 421 is divided by the Malgas/Infanta road. On the small portion closer to the Breede River, Mr Steinhofel installed a windmill (a "*windpomp*") shortly after the plaintiff took transfer. He also installed a telephone line, and an electricity cable along the fence. He testified that all the telephone and water lines, as well as the electricity cable, ran to the house along the western boundary of the property, close to the existing fence between the parties' properties. On the relevant photographs these service cables are to be seen virtually underneath the fence.

22. From about 2003 or 2004 onwards Mr Steinhofel upgraded the property to render it suitable for use as a guest farm. He constructed cottages to the left of the entrance into the property, erected paddock fencing, and planted an avenue of olive trees next to and on either side of the driveway leading up to his homestead.⁹ He also built stone walls on either side of the entrance to the driveway – reference has been made earlier to the fact that the entrance wall on the western side of the driveway into the plaintiff's property is on the defendant's side of the cadastral boundary.

Ownership of the defendant's property over the years

23. The defendant's property (erf 420 Malagas) was surveyed and subdivided from erf 422 in 1971, at the same time as erven 419 and 421.

⁹ One of the lines of trees therefore falls within the disputed strip of land.

24. Erf 420 was transferred to Mr Jan Dawid Lourens in 1972 in terms of deed of transfer T651/1972. In 1982 Mr Lourens sold and transferred the property to Mr Johannes Marthinus Swanepoel in terms of deed of transfer T35957/1982. In 1988 it was acquired by Mr Hendrik Johannes Abraham Walters, who sold it to Mr Gordon Quinton Morgenrood in 1989, it being transferred to the latter in 1990. Mr Morgenrood's deceased estate sold erf 420 to Mr Charl Ernest Hubner and Ms Jenny Dirce Steinbauer in March 2005. It was transferred into their names in July 2005.

25. The defendant purchased erf 420 from Mr Hubner and Ms Steinbauer on 10 December 2018, and it was registered in his name on 18 February 2019.

The wire fence between the properties, and the plaintiff's evidence in respect thereof

26. As indicated, the disputed boundary is the boundary between erf 421 (now part of erf 496) and erf 420. Although erf 421 no longer exists as such, it is practical in the context of the dispute to refer to it, and not to erf 496.

27. During a survey conducted on 22 March 2019 by land surveyor Mr Pieter Houterman,¹⁰ the beacons of Erf 420 were detected and/or replaced ("*opgespoor en/or herplaas*", in Mr Houterman's words). He discovered that the wire fence between erven 420 and 421 did not follow the cadastral boundary between them.

28. Mr Houterman further determined the encroachment to be in the shape of a long, thin triangle. The fence and the beacon coincided at the back of the erven (near the existing building on erf 421) but the fence gradually deviated from the cadastral boundary until it reached the municipal road near the entrances to the erven about 150m away. At that point the fence encroached about 2.5 metres into erf 420.¹¹

¹⁰ Called by the plaintiff as expert witness.

¹¹ The extent of the encroachment appears from a diagram prepared after the survey by Mr Houterman (drawing number E420M_tp), which depicts both the "*existing fence*" and the cadastral boundary. It also shows the extent to which the north-western wall of the building

29. The discovery of the non-alignment of the fence and the cadastral boundary on 22 March 2019 led to the parties' dispute.
30. The wire fence between erven 420 and 421 is old and rusted. It has several strands of wire (the original strands were barbed) and metal rods and wooden posts. Many of the metal rods are thin, while others are more substantial Y or I droppers. The wooden posts are round poles, or "*latte*". The fence was evidently intended to be a permanent structure.
31. As indicated earlier, the fence is attached to a railway sleeper constitutes the common southern corner beacon between erven 420 and 421, behind the house on erf 421. It then runs parallel to, and within a few centimetres of, the house, whereafter it continues to run up to the north-western entrance of erf 421 on the Malgas/Infanta road. It recommences on the other side of the road, terminating close to the Breede River. The two sections of the fence are in a straight line.
32. Mr Steinhofel testified on the plaintiff's behalf that the fence had never been moved after the plaintiff's purchase of the property. It continued to exist in the same position it currently occupies as when he had first visited erf 421 a few months prior to the plaintiff taking transfer. When he first visited the property, the fence was rusted and looked old. Three photographs which he took of the driveway and the house, with the fence in view, were submitted into evidence. They depict a straight and sturdy, if rusted and clearly old at certain junctures, fence.
33. Mr Steinhofel accepted, at the time of the plaintiff's purchase of the property, that the wire fence was the boundary of erven 420 and 421, and he regarded it as such. He repaired it from time to time. On occasion, sheep had grazed in the property and were kept inside by the fence. Mr Steinhofel was, until March 2019, unaware of any dispute about the boundary.

on erf 421 crosses the cadastral boundary. The drawing was attached to the summary of Mr Houterman's expert evidence under Rule 36(9).

34. The time period between the plaintiff's taking possession of the property (in 1991) and the arising of the dispute with the defendant (in 2019) is 28 years. If Mr Steinhofel's evidence is accepted (and there is in my view no reason why it should not be), then the question arises whether the fence had been regarded as the boundary between erven 420 and 421 from April/May 1989.¹² If so, it would amount to a period of 30 years, the requisite period for the purposes of acquisitive prescription.

35. The evidence of Mr Leon Nabal¹³ was that the same fence was there when he had first visited erf 421 in January 1989. It was not new, but it was "*sturdy*". Mr Nabal confirmed that the fence had commenced at the railway sleeper and had run close along the side of the house, and that it had then continued in a straight line down to the Breede River, broken only by the Malgas/Infanta road.

36. He testified that when he wanted to extend the jetty on the river edge of erf 421 he looked for the corner beacon on the riverside portion of erf 421 with the help of the local shopkeeper, and found a peg which he believed to be the beacon (and which the local shopkeeper informed him was the beacon) buried in the ground exactly in line with, and in the ground below, the fence. Mr Nabal testified that when he returned¹⁴ to erf 421 about month prior to the trial, the fence was where it had always been. He said that he told Mr Steinhofel about the peg which was in line with the fence, and excavated it to show to Mr Steinhofel. Mr Nabal identified this peg as a 12mm peg on one of the photographs tendered into evidence.

37. Mr Steinhofel testified how, after the dispute arose, one of the plaintiff's labourers (one "Nathi") had informed him that there was another peg in addition to the true beacon which had been unearthed by Mr Houterman. Nathi then dug and found the same peg which Mr Nabal had found more than 25 years before. Mr Steinhofel confirmed that it was the same peg

¹² Mrs Nabal took transfer of the property during March 1989.

¹³ Mrs Nabal's husband.

¹⁴ During April 2023.

which Mr Nabal had pointed it out to him when he had recently visited the property.

38. Mrs Nabal's evidence was that she had also recently visited erf 421, and that the fence appeared to be the same as the fence which had existed between erven 421 and 420 when she had owned the former. She testified that her children had played in the garden bounded by the fence. Mr and Mrs Nabal both testified that they had always regarded the fences around erf 421 as the property's boundaries. No-one had ever suggested to them that the fences were not its boundaries.

The defendant's pleaded case, and an assessment of the evidence

39. The defendant's pleaded case¹⁵ is based on five contentions, namely that:

- 39.1. at the time of the consolidation of erven 421 and 494 the land surveyor (who was Mr Houterman) pointed out the true beacons between erven 420 and 421, and the plaintiff was thus aware thereof, alternatively, should reasonably have been aware thereof;
- 39.2. any fencing near or along the boundary between erven 420 and 421 was old paddock fencing in place before 15 October 1971;
- 39.3. alternatively, the plaintiff or Mr Steinhofel erected the fence during or about 2010;
- 39.4. the plaintiff concealed the true beacons; and
- 39.5. as a result, the defendant and his predecessors-in-title were unaware of the encroachment and did not know where the true

¹⁵ The defendant's case was initially (as set out in a letter from his attorney to the plaintiff's attorney in May 2019) that Mr Steinhofel had been told about the position of the boundary pegs in 1997; that his employees had illegally deposited building rubble in the river; and that he erected an illegal fence onto erf 419. It is not necessary to consider the allegations of unlawful conduct as they are irrelevant to the present dispute.

beacons were.

40. I shall return to these contentions after briefly setting out the evidence led on the defendant's behalf.

41. Although the defendant did give evidence, he could not give any evidence regarding the purpose or the positioning of the fence prior to March 2019.¹⁶ He relied in that respect on the evidence of Mr Francois van der Merwe and Mr Ferdi Cronje.

42. Mr van der Merwe testified that he had stayed on the plaintiff's property while he worked as a security officer for the plaintiff from about 2005 or 2006 to about 2006 or 2007. When he arrived at the property, the stone entrance walls had already been built, as had two cottages and the paddock fencing.

43. Mr van der Merwe said that the driveway and the fence looked similar to those depicted on some of the recent photographs tendered into evidence on behalf of each of the parties. The avenue of olive trees was planted along the entrance way during the time that Mr van der Merwe stayed there. He testified that thereafter, but for the size of the olive trees, the driveway looked similar to what it looks like on a recent photograph showing the driveway and trees leading up to the house. He testified that the olive trees were on the left-hand side of the fence as you drove into the property (that is, on the driveway side of the fence) as shown in the photograph. Mr van der Merwe said that the fence started behind the house, that it ran alongside the house, more or less parallel to it and within a few centimetres of it, and that it thereafter continued to run in a straight line towards the road and the river.

44. Despite his evidence that the fence had continued to run in a straight line, Mr van der Merwe testified that the fence had ended up somewhere near the middle of the stone wall entrance way, and not where it currently ends, namely at a fence post at the edge of the stone wall. Where Mr van der Merwe placed the fence was about 1.5m or 2m from where it currently ends.

¹⁶ The defendant took transfer of the property in February 2019.

The imaginary cadastral boundary line would have run along the other end of the stone wall about 2.5 metres away.

45. Mr van der Merwe also testified that there was a fence that ran “*right up against*” the windmill on the river side of the road, and that that portion of the fence and the fence on the other side of the road lined up in a straight line. Mr van der Merwe testified that he once had to “*work through the fence*” to replace rubbers on the windmill. He did not know whether there was a fence along the line where there is currently a fence on the river-side portion. He said that it was too overgrown at that time for him to have known whether there was a fence there.

46. Mr van der Merwe testified that he did not know if the fence had been moved and that he did not move it, but he also testified that he presumed it had been moved, based on the photographs he has seen: as indicated, he testified that the fence did not run along the line it currently does to end where it currently ends. He conceded, however, that he had had no reason to give any consideration to the fence at the time he lived on the property, that he had been on the property for only 2 or 3 years, and that he had not gone and looked at the fence again since leaving the property. His evidence was based on what he saw on the photographs used in evidence. Although he had driven past the property many times subsequently, he had not noticed that there had been any change in the fence.

47. I agree with counsel for the plaintiff’s criticisms of Mr van der Merwe’s evidence. He refused to acknowledge that he could be mistaken, and remained adamant on the two points that he apparently believed would assist the defendant, namely where the fence ended, and the alleged existence of a fence close to the windmill. He attempted to suggest that the fence had originally been along or close to the cadastral boundary.

48. There are many improbabilities in his version. First, it was improbable, as Mr van der Merwe conceded, that the windmill would have been erected¹⁷

¹⁷ Mr Steinhofel erected the windmill after the plaintiff had taken transfer of the property.

virtually on top of a fence.

49. Second, in about 1990 Mr Leon Nabal had observed that the fence on the river side had been exactly in line with the peg which he saw again in April 2023, and the fence on the river side had lined up exactly with the fence on the other side of the road. If Mr Nabal is to be believed (there is no reason not to) then the fence to the south of the road was moved after the Nabals had left the property. No reason for this was, however, provided, and none seems to exist: why would the fence have been moved closer to the plaintiff's entrance way? Mr Steinhofel would have had no incentive to move the fence closer to his driveway.

50. Third, the fence would have had to have been moved back into the exact position it had been when the Nabals had owned the plaintiff's property, because that was how Mr Nabal saw and remembered it.

51. Fourth, if the fence ran parallel to the house and carried on straight, then it ends up where it currently ends up (as Mr Steinhofel, Mr Nabal, and Mr Houterman all testified). It does not end up where Mr van der Merwe suggested it did.

52. Fifth, if the fence terminated where Mr van der Merwe says it terminated in about the middle of the stone wall, then the fence would have had to have deviated significantly somewhere close to the stone entranceway. This is, however, inconsistent with Mr van der Merwe's testimony that the fence had been straight.

53. Sixth, if the fence ran straight from the windmill through the middle of the stone entranceway wall, it would have ended up somewhere on the hillside of erf 420, and not at the railway sleeper at the back of the plaintiff's property as it does.

54. Seventh, on Mr van der Merwe's version the fence would have been on the wrong side of many of the olive trees planted on the right-hand side of the

plaintiff's driveway. It is improbable that Mr Steinhofel (or any landowner) would knowingly have planted his avenue of trees on neighbouring land.

55. Eighth, the stone wall at the entrance way would have been built beyond the apparent boundary of the plaintiff's property, and would have continued for a metre or more along the boundary of erf 420, which is also improbable.

56. Ninth, Mr van der Merwe's evidence of having to climb through a fence to work on the windmill is unlikely given that the fence was (on his version) only on one side of the windmill, and it therefore would have been accessible (bushes notwithstanding) from another side.

57. Notably, Mr van der Merwe's evidence did not coincide with the defendant's case either (to the extent that the defendant suggested that the fence originally ran to the real north-east beacon). From the defendant's perspective as it became clear over the course of the trial (namely that the fence had been the real boundary fence but had been moved) Mr van der Merwe would therefore have had to have been mistaken about where the fence ended up in relation to the stone wall, and where it ran in relation to the windmill.

58. The answer to Mr van der Merwe's evidence was provided when a photograph was put to him during cross-examination, which appeared to show (and which Mr Ferdinand Cronje¹⁸ later acknowledged it showed) the fence post during the floods of 2008 in the position in which it currently is.

59. Mr van der Merwe's evidence was also contradicted by the concessions eventually made by Mr Cronje, albeit that the latter was an unimpressive witness who changed versions when the shoe pinched. Again, I agree with the plaintiff's counsel's criticisms of Mr Cronje's evidence. He was a former employee of Mr Steinhofel's (having eventually been dismissed) and appeared antagonistic towards him. Mr Cronje had worked on the plaintiff's property on two occasions, from about 2010 or 2011 for about 3 years, and

¹⁸ A witness called on the defendant's behalf.

again (after about 2 years away) for about 4 years.

60. Mr Cronje testified in chief that the fence post at the stone wall at the Malgas/Infanta road had been in the same position as Mr van der Merwe had testified. He also testified that, like Mr van der Merwe, he too had had to climb over or through a wire fence to work on the windmill. He then testified (still in chief) that he had been instructed by Mr Steinhofel to move the fence into the property of erf 420 so that the service lines and cables running to the house on erf 421 were within the fence. According to Mr Cronje, the service lines (whose location he denied knowing) would have run on erf 420's side of the fence if it had not been moved. He testified that when the defendant had accidentally damaged the electrical cable¹⁹ to Mr Steinhofel's house the cable had been located 2m into the defendant's property. Mr Cronje was requested to repair the cable.

61. It became unnecessary to consider the improbability of Mr Steinhofel having run the services to his house on the defendant's side of the fence because, after Mr Cronje had seen the photograph of the fence post in the 2008 flood,²⁰ his evidence changed. Although he vacillated from time to time, his evidence during cross-examination culminated in the concession that the fence post's current position is where it has always stood. He testified that he never moved the fence anywhere near the house, and he never moved the fence anywhere else.

62. Mr Cronje testified (in the end) that he might have taken out a few fence poles but that was only so that holes could be dug for new trees, and that he had taken care to replace the fence poles in the same place. He therefore confirmed that where the fence currently runs is where it has always run. His evidence that the electrical cable which he had repaired had been 2m on the defendant's side of the fence was contradicted by the defendant, since it was clear from the defendant's evidence that the cable had been on the cadastral boundary, on erf 421's side of the fence:

¹⁹ An incident also referred to by the defendant and Mr Steinhofel.

²⁰ The 2008 photograph which was also shown to Mr van der Merwe.

the defendant testified that work had to be done on both sides of the fence so as to repair the cable.

63. It is useful to return to the defendant's five pleaded contentions against the background of the evidence set out above.

64. As to the defendant's first contention (that at the time of the consolidation of erven 421 and 494 the land surveyor had pointed out the true beacons between erven 420 and 421), both Mr Houterman and Mr Steinhofel testified that this never occurred. There is no reason to disbelieve them. I agree in any event with the plaintiff's argument that, even had the contention been correct, it would not have mattered provided that the plaintiff continued to possess the land up to the fence in the manner required for acquisitive prescription.

65. The defendant's second (any fencing near or along the boundary between erven 420 and 421 was old paddock fencing in place before 15 October 1971) and third (the plaintiff or Mr Steinhofel erected the fence during or about 2010) contentions are mutually exclusive, albeit that they are couched in the alternative. There was no evidence to support the second contention, and it is inconsistent with the presence of the well constructed fence Mr and Mrs Nabal saw when they visited the property in early 1989. Also, it would have been highly coincidental that the paddock fencing just happened to follow, almost exactly, the actual boundary. The present fence was clearly intended to be a permanent boundary fence.

66. Similarly, no evidence was adduced to support the third contention; and it is inconsistent with the evidence of Mr and Mrs Nabal, as well as Mr Steinhofel. It is also inconsistent with the expert opinion of Mr Houterman, namely that the fence had existed for more than 30 years.

67. The defendant's fourth contention is that the plaintiff concealed the true beacons. He provided nothing in support of this allegation, which was in any event refuted by the evidence. It would also have been legally irrelevant,

provided the plaintiff possessed the strip of land openly and as if it were the owner thereof.

68. The defendant's fifth contention depends on proof of the factual allegation underpinning the fourth contention, namely that the plaintiff concealed the true beacons. Assuming, however, the correctness of the defendant's factual allegation, his fifth contention is that the plaintiff's concealment of the true beacons caused him and his predecessors-in-title "to be uninformed of such encroachment" and to have "no knowledge as to the true beacons". Even if the fifth contention is true (that the defendant and his predecessors-in-title were unaware of the encroachment and did not know where the true beacons were), this does not help him. This is because a lack of knowledge on the part of the true owner is irrelevant: an owner's inability to know that his property is being occupied by another is no defence to a claim of acquisitive prescription.²¹

69. The defendant's real case - as it emerged during the trial - was that the fence had been moved in about 2010. The suggestion that the fence could have been moved was made to Mr Nabal during cross-examination. He responded that he believed he would have noticed even if the fence had been moved only a little way. Subsequently, during the cross-examination of Mr Steinhofel, it was pertinently put to him that the fence had been moved by Mr Cronje. Mr Steinhofel denied this. This case had not been foreshadowed in either the pre-litigation correspondence from the defendant's attorney, or the defendant's plea or counterclaim.

70. The parties have, to a limited extent, presented mutually destructive versions. Given the retraction by Mr Cronje, the only evidence inconsistent with the plaintiff's case was Mr van der Merwe's evidence regarding the north-west fence post.

71. The approach when determining which of two mutually destructive versions should be accepted was restated in *Stellenbosch Farmers*

²¹ *Pienaar v Rabie* 1983 (3) SA 126 (A).

*Winery Group Ltd and another v Martell et Cie and others:*²²

“... To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

72. In *Body Corporate of Dumbarton Oaks v Faiga*²³ the trial court was admonished for having ignored the probabilities and for not having had regard to the expert evidence regarding the probabilities:

“The occurrence, Joubert AJ found ... was unexpected and remains

²² 2003 (1) SA 11 (SCA) at para [5].

²³ 1999 (1) SA 975 (SCA) at 978I-980H.

unexplained. It was not maintenance-related. The undisputed expert evidence is that such 'once-off occurrence' is highly improbable and 'very, very unlikely'

.... The Judge's failure to decide the case without regard to the wider probabilities is a clear misdirection and entitles us to reassess Mrs Shiloane's evidence. It was also wrong of the Judge to consider that a non-acceptance of her evidence of necessity requires a finding that she is a deliberate liar and perjurer.... That is an emotional approach. In a civil trial the question is whether her evidence is, on the probabilities correct. Few witnesses whose evidence is not accepted can be described as deliberate liars and perjurers In view of the technical evidence recited earlier, Mrs Shiloane's evidence is inherently improbable

.... In my judgment the Court a quo should have held that the plaintiff had failed to prove on a balance of probabilities that the cause of the incident was as described by Mrs Shiloane."

73. It is clear from these *dicta* that the probabilities are paramount.

74. The present matter is not a case where all factors are equipoised. I have indicated above that Mr Van der Merwe's evidence was implausible and contradictory. The probabilities are stacked against it. By his own admission he had not had any regard for the fence while he worked at the plaintiff's property up until 2008, and he had not had any reason to think about it until recently. That his evidence was echoed in similar terms by Mr Cronje (who, as far as credibility is concerned, did not make a favourable impression at all)²⁴ adds to the conclusion that it was rehearsed.

75. In this case the probabilities weigh heavily in the plaintiff's favour. In any event, to succeed in establishing its version, the plaintiff need not prove that its version is the only possibility or the only reasonable possibility, but only that it is the most readily apparent and acceptable conclusion.²⁵

²⁴ I say this being aware of the distinction between credibility and the probabilities as highlighted in *Dumbarton Oaks*.

²⁵ *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614E-H.

Did the plaintiff satisfy the requirements of acquisitive prescription?

76. The plaintiff must prove four elements to establish that it has become the owner of the strip of land:

- 76.1. possession of the strip of land by it and previous owners of erf 421;
- 76.2. openly;
- 76.3. as owners; and
- 76.4. for an uninterrupted period of thirty years.

77. It was held²⁶ that a plaintiff *prima facie* satisfies the requirements of *nec vi, nec clam, nec precario* by “proving peaceable and open occupation adversely to and, therefore, to the exclusion of the right of the true owner for thirty years”.²⁷

78. Once a person establishes the requirements for acquisitive prescription, he establishes his ownership of the thing in question. The former owner cannot defeat the claim by alleging an absence of negligence on his part, or by alleging it was impossible for him to have known that part of his property was being occupied by another, or by alleging that because of ignorance on his part he did not exercise his rights of ownership over the property in question.²⁸

79. I turn to the individual requirements in the context of the evidence.

Possession

80. The possession required to establish ownership of land through acquisitive prescription is *possessio civilis*, being the physical control of

²⁶ With reference to the 1943 Act, but requirements in the 1969 Act do not differ materially from those posed in the 1943 Act (*Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) at para [8]).

²⁷ *City of Cape Town v Abelsohn's Estate* 1947 (3) SA 315 (C) at 326, quoted with approval in *Bisschop v Stafford* 1974 (1) SA 1 (A) at 9E.

²⁸ See *Pienaar v Rabie* 1983 (3) SA 126 (A).

the property (*detentio*) accompanied by the intention of an owner (*animus domini*).²⁹

81. The mental element of *possessio civilis* (that is, the “*intention of an owner*”) is expressed by the requirement of the 1969 Act that physical control be exercised “*as if he were the owner*”.³⁰ That aspect is considered separately below, under the requirement “as owners”.

82. *Detentio* does not require continual physical occupation. A person has *detentio* even if he leaves the property but can resume occupation at any time. What is required is that the person should exhibit the power at his will to deal with the property as he likes, and to exclude others.³¹ The test for physical possession “*is whether a reasonable person would draw the inference that the occupation and use in question established occupation of the unit claimed*”.³²

83. That the plaintiff (or persons on its behalf) might not have walked over every inch of the land (or even over any of it) does not affect its right to rely on prescription: “*It is not necessary that every part of the area be occupied or used; in some circumstances use of every square foot of an area would be impracticable, and the test is whether there was such use of the part or parts of the ground as amounts, for practical purposes, to possession of the whole.*”³³

84. Occupation can be established merely by showing, as in the present matter, that the land in question formed part of and was treated for all practical purposes as a single physical entity. It was incorporated into erf 421 by way of the fence, which constitutes use adverse to the true owner.³⁴ This establishes at least *prima facie* proof of possession. An observer at any time

²⁹ *Joles Eiendom (Pty) Ltd v Kruger and another* 2007 (5) SA 222 (C) at para [28].

³⁰ D. Carey-Miller *The Acquisition and Protection of Ownership* (Juta & Co., 1986) p. 66.

³¹ *Ex parte Van der Horst: In re Estate Herold* 1978 (1) SA 299 (T) at 301FG.

³² *Welgemoed v Coetzer and others* 1946 TPD 701 at 723.

³³ *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and another* 1972 (2) SA 464 (W) at 467H-468A.

³⁴ See *Pienaar v Rabie* 1983 (3) SA 126 (A); *Payn v Estate Rennie and another* 1960 (4) SA 261 (N).

while the fence was in position would have formed the impression that the strip of land was part of the plaintiff's property.³⁵

85. It is clear from the evidence that the plaintiff has exercised physical possession of the strip of land since purchasing erf 421 through Mr Steinhofel, and through the plaintiff's employees on its behalf. The plaintiff also made permanent improvements to the strip by planting trees, moving rocks, and laying down pipes for services. That is the conduct of someone who holds the land in question as if he were the owner.³⁶

86. The defendant did not advance any evidence of his own in relation to his own use and possession of the land, and was unable to gainsay the plaintiff's evidence.

Possessing "openly"

87. This requirement in section 1 of the 1969 Act corresponds with the "*nec clam*" requirement of the 1943 Act. It was defined for the purposes of the 1943 Act as "*so patent that the owner, with the exercise of reasonable care, would have observed it*".³⁷

88. The plaintiff's counsel referred in argument to Carey Miller's observation that the practical effect of this *dictum* "*is to require the claimant to establish that the nature of his possession was such that a reasonable man would have been aware of it*".³⁸ In the present case, the strip of land was enclosed by a fence and physically formed part of erf 421. Owners of erf 420 could not help but to have been aware of this. The plaintiff and its predecessors-in-title never hid their claim to the area.

Possessing "as if the owner"

³⁵ *Ex parte Van der Horst: In re Estate Herold* 1978 (1) SA 299 (T) at 300H-301A.

³⁶ *Joles Eiendom (Pty) Ltd v Kruger and another* 2007 (5) SA 222 (C) para [31].

³⁷ *Smith & others v Martin's Executor Dative* (1899) 16 SC 148 at 151; and see *Bisschop v Stafford* 1974 (3) SA 1 (A) at 8A.

³⁸ D. Carey-Miller *The Acquisition and Protection of Ownership* (Juta & Co., 1986) pp 163-164, with reference to *Briers v Wilson and others* 1952 (3) SA 423 (C) at 433D.

89. The plaintiff and its predecessors-in-title were required to have held the strip of land “as owner”. This is the correlative of the requirements “*nec vi*” and “*nec precario*”³⁹ of the 1943 Act. The test is objective: “*The test to be applied is whether a reasonable person would infer from the circumstances of the claimant's possession that the property was held 'as if by the owner'. There must be sufficient acts of ownership by the claimant to support such an inference there is no fixed or final set of appropriate fact situations. The right of ownership can be manifested in a variety of ways.*”⁴⁰
90. The mental state of possessing as if one is the owner covers both the *bona fide* possessor and the *mala fide* possessor,⁴¹ and possession in the *bona fide* but mistaken belief that one is the owner suffices.⁴²
91. Possession even in the knowledge that one is not the owner is sufficient, provided one occupies the land as owner or with the intention of keeping it for oneself. As long as the possessor does not manifest a recognition of the true owner's rights, it does not matter that the possessor knows that he or she is not the owner.⁴³
92. Returning to Carey-Miller:⁴⁴ “*The right of ownership can be manifested in a variety of ways. An obvious situation which would satisfy the requirement of possession as owner is that in which the possessor has used the land of another on the basis of a genuine mistake as to the boundary ... In such a case the fact that the land was not identified as a separate unit, but was simply treated by the claimant on the assumption that it was part of his land, would probably be conclusive of the requirement of possession 'as if he were owner'.*”

³⁹ See *Smith and others v Martin's Executor Dative* 16 S.C. 148 at p. 151.

⁴⁰ D. Carey-Miller *The Acquisition and Protection of Ownership* (Juta & Co., 1986) p. 171.

⁴¹ *Morgenster 1711 (Pty) Ltd v De Kock and others* 2012 (3) SA 59 (WCC) at para [14].

⁴² *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 (2) SA 464 (W) at 474B.

⁴³ *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) at 680B-C; and see *Welgemoed v Coetzer and others* 1946 TPD 701.

⁴⁴ *Op cit* at pp 73-74.

93. The presence of the fence is significant, given the objective test. The fence embraces, on one side, the strip of land to which the plaintiff lays claim. It incorporates, on the other side, the strip into the remainder of the plaintiff's property, making it an indivisible whole as a matter of appearance. Fences are by definition used by property owners generally to mark property boundaries across which access is controlled, restricted or prevented - this is a matter of everyday knowledge and experience. The erection of a fence is clear evidence of the belief of a person regarding his or her rights to the land enclosed.

94. In the present matter, for so long as the fence was in existence the plaintiff and its predecessors have held the strip of land "as owner". The area is indistinguishable from the rest of erf 421, and there is no reason why anyone would have distinguished between the sliver and the rest of erf 421. Objectively, everyone would have regarded the fence as the outer extent of their property. Neither the Nabals nor the plaintiff ever recognised the rights of the owners of erf 420 to the strip of land.

95. As regards the *animus* element, Mr Steinhofel's evidence on behalf of the plaintiff was clear. Nobody ever suggested (prior to the arising of the dispute) that the fence was not the boundary. Mr Steinhofel did not regard the strip of land in dispute as being in any way different from the rest of erf 421. He regarded it as part of the plaintiff's property, and the plaintiff held it as the owner.

Possessing for 30 years

96. The land is to have been held for an undisturbed period of thirty years: "... *the required continuity of occupation need not be absolute continuity, for it is enough if the right is exercised from time to time as occasion requires and with reasonable continuity*".⁴⁵

97. As regards proof, "... *In practice the claimant need do no more than*

⁴⁵ *Welgemoed v Coetzer and others* 1946 TPD 701 at 720.

demonstrate that possession - including that of predecessors in title insofar as this is relevant - endured for the thirty-year period to a sufficient degree to justify the conclusion ... that the exercise of rights of ownership was continuous. It will then be up to the defendant, who challenges the claim, to establish that possession was not continuous - either in the general sense, or by reason of the specific disturbance of continuity through the interruption or suspension of possession'.⁴⁶

98. The defendant cannot deny that the wire fence (or one in a substantially identical position) has been in position since at least January 1989, and probably well before then. Nobody disputed that the fence served as the boundary between the two properties from at least January 1989 until March 2019. Prior to the plaintiff's purchase of erf 421 ownership up to the fence was exercised by its predecessor in title, Mrs Nabal, and before her it would have been exercised by Olivier.

99. One may infer from the fact that the fence commences at the common beacon at the back of erven 420 and 421 that it was intended to be a boundary fence. This inference becomes all the more compelling given that the fence was clearly intended to be a permanent structure, and given that it almost exactly followed the actual boundary line at its commencement and for some considerable distance thereafter. That the fence was intended to be the boundary becomes clear when one considers that it followed a direct line to another beacon (a peg in the ground, of similar size of various other pegs used by land surveyors). No other reason for the erection of a fence along this presents itself.

100. Further support for the conclusion that the fence was intended to be, and was regarded by all concerned, as the boundary between erven 420 and 421 is the fact that there used to be parallel tracks on either side of the fence. The one track led to the building on erf 421 (the photographs show that the track ran along the same route as the current driveway to the house), and

⁴⁶ Carey Miller *op cit* at p. 177, and see *Ex parte Van der Horst: In re Estate Herold* 1978 (1) SA 299 (T) at 301C-D.

the other to erf 419, towards the “rear” boundary with erf 421. This indicates not only that the fence was in position, but also that it was regarded at the dividing line between the erven prior to 1989.

101. The present case bears similarities to the one set out in *Margaret Loretta de Haan v Cranberry Bush Property Investments (Pty) Ltd*,⁴⁷ in which the Court held⁴⁸ that “..the wire fence was erected in 1948, it physically separates the properties from one another and was not moved or replaced from at least 1972 up and until the present dispute arose. ... In my view it may reasonable by presumed that the De Klerks regarded the fence as the boundary of their property. If that is the case, then then clearly possessed the disputed land openly and peacefully”.

102. There was, moreover, no particular benefit to be gained from deviating from the actual boundary. The sliver of land between the fence and the cadastral boundary was, and still is, not valuable. It is highly improbable that the owner of 421 would have paid to use it in the manner that it has been used over the years.

Conclusion

103. The case is to be decided on the probabilities. The question is whether the plaintiff's predecessors in title occupied the strip of land as of right. Their state of mind is to be inferred from the facts.⁴⁹

104. As to the drawing of inferences, the approach in civil cases is as follows: “Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work *Evidence*

⁴⁷ Unreported decision of this Court (per Manca AJ) under case number 18595/2007, delivered on 8 October 2008.

⁴⁸ At paras [50]-[51].

⁴⁹ See *Bisschop v Stafford* 1974 (3) SA 1 (A) at 9H-10C.

*(3rd ed., para. 32), by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.*⁵⁰

105. As indicated, on the available evidence it may reasonably be inferred that the plaintiff's predecessors-in-title regarded the fence as the boundary. The existence of the old fence is evidence of possession and control of the land. It is also evidence of an intention to exclude the world at large from the full extent of the property bounded by the fence. The fact that the fence has not been moved since 1989 (at the latest) is also evidence that the possession and control in question have remained undisturbed during all these years. The defendant did not call any of the previous owners of erf 420, and he did not explain why he had not done so. Their evidence would presumably not have helped his case.

106. On this issue, each of parties raised the failure of the other to call certain witnesses (the defendant criticised the plaintiff for failing to call Nathi, the plaintiff's labourer) and requested the Court to draw an adverse inference therefrom. It has been held⁵¹ that when "a witness is equally available to both parties, but not called to give evidence, it is logically possible to draw an adverse inference against both. The party on whom the onus rests has no greater obligation to call a witness, but may find that a failure to call a witness creates the risk of the onus proving decisive. In the present matter the appellant did not have an opportunity equal to the respondents to call this witness. The adverse inference drawn by the trial court against the appellant was unjustified in the circumstances. An adverse inference in any event does not operate to destroy a case otherwise proved, which is what the appellant managed to do".

107. In the present case I am satisfied that the *prima facie* discharge of the onus by the plaintiff has not been disturbed, and that the plaintiff has proved,

⁵⁰ *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-B-D.

⁵¹ In *Raliphaswa v Mugivhi and others* 2008 (4) SA 154 (SCA) at para [15]. Emphasis supplied.

on a balance of probabilities, that it and its predecessors-in-title have possessed the disputed strip of land openly, as owner, for a 30-year period. It is not necessary to rely on an adverse inference against either party.

108. The plaintiff knew of no claim to ownership to the strip of land on its side of the fence by any owner of erf 420 until the defendant made his claim in March 2019. Nobody else was ever previously made aware of any disagreement regarding the boundary. The defendant did not adduce any evidence of such a claim. All of the evidence points to the fact that the plaintiff's and the defendant's predecessors in title accepted the fence as being the boundary between their properties.

109. The *animus* of Mrs Nabal's predecessors is also to be inferred from the presence of the fence. They would have regarded the fence as the boundary of their property, and they would thus have held all the land up to the fence as owners thereof. The defendant did not suggest that there had existed an agreement about the positioning of the fence in terms of which the owners of erf 421 were allowed to occupy the strip of land by way of any form of revocable permission. On the contrary, such suggestion would be in conflict with the defendant's contentions as set out in his pleadings. Even if, however, there had originally been such an agreement, there can on the evidence be no suggestion that subsequent owners (the Nabals or the plaintiff) ever knew about it.⁵² The evidential duty to raise a precarious consent rested on the defendant,⁵³ because the plaintiff "*satisfies prima facie these requirements (for prescription) by proving peaceable and open occupation adversely to and, therefore, to the exclusion of the rights of the true owner for thirty years*".⁵⁴

110. Thus, the mere fact that the fence has been in position between the

⁵² Compare *City of Cape Town v Abelsohn's Estate* 1947 (3) SA 315 (C).

⁵³ See also *Margaret Loretta de Haan v Cranberry Bush Property Investments (Pty) Ltd* (unreported decision of this Court (per Manca AJ) under case number 18595/2007, delivered on 8 October 2008) at paras [52]-[56].

⁵⁴ *City of Cape Town v Abelsohn's Estate* 1947 (3) SA 315 (C) at 326. See *Bisschop v Stafford* 1974 (3) SA 1 (A) at 9D-H: "*There is much to be said for the proposition - it would relieve a claimant of the burden of proving a negative which he in many cases could not establish simply because the passage of time has made it impossible.*"

properties since some time before 1989⁵⁵ establishes inferentially that the strip of land was "*occupied*" by the various owners of erf 421 "*openly*", and "*as owners*".

111. Upon a holistic consideration of the evidence, I am satisfied that there are no considerations in the present matter which excuse the defendant and his predecessors from the ordinary consequences of prescription. They could see the fence. They would have known that ordinary property owners regard fences as boundaries. Accordingly, even if hardship were a consideration in the present proceedings (which it is not), the order which is sought is not unfair to the defendant. I do not regard the provisions of section 25⁵⁶ of the Constitution of the Republic of South Africa, 1996, as being helpful to the defendant in the particular circumstances of this matter, despite his counsel's invocation of the provision.

112. It is accordingly ordered as follows:

112.1. The plaintiff is declared to be the owner, by acquisitive prescription, of the land between the cadastral boundary between erven 420 and 421 Malagas and the "existing fence" as shown on the contour and detail plan, drawing number E420M_tp, dated April 2019 / May 2022, by Bekker and Houterman Land Surveyors.

112.2. The defendant's claim in reconvention is dismissed.

112.3. The defendant shall pay the plaintiff's costs in relation to the latter's claim and the defendant's claim in reconvention, which costs shall include the qualifying fees of Mr Pieter Houterman, land surveyor.

⁵⁵ The Nabals' evidence as regards the existence of the fence and how they regarded it when taking transfer of the property and thereafter, distinguishes the present matter from the facts considered in *Morgenster 1711 (Pty) Ltd v De Kock and others* 2012 (3) SA 59 (WCC) at paras [22]-[24], and para [38].

⁵⁶ Section 25 provides that "*no one may be deprived of property except in term of law of general application, and no law may permit arbitrary deprivation of property*".

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the plaintiff:

Mr D. Melunsky SC, instructed by Michael
Ward Attorney

For the defendant:

Mr E. Janse van Rensburg, instructed by
Johann Viljoen & Associates