

PRESCRIPTION CLAIM THWARTED IF POSSESSOR USED WATER AND ELECTRICITY ON THE PROPERTY ILLEGALLY?

Gianchandi v Registrar of Deeds, Pietermaritzburg and Others (D3519/2021) [2023] ZAKZDHC 10 (14 March 2023)

An interesting question arose in this matter. Mrs G had exercised ownership rights in respect of a property for over 30 years and sought an order confirming that she had acquired ownership by virtue of acquisitive prescription. One of the arguments raised in defence by the registered owner of the land in question was that the possessor had illegally connected water and electricity to the property, which conduct was not what a possessor exercising rights “as owner” would do.

In the circumstances of this matter, the court explained that such illegality did not taint the claim made by the possessor.

The Judgment can be viewed [here](#).

FACTS

Mr and Mrs Gianchandi bought a property in April 1990. (Mr Gianchandi subsequently passed away.) Three houses away from this property was a tract of undeveloped land which is the subject matter of this dispute.

As this neighbouring land was both undeveloped and deserted, Ms Gianchandi and her family made several improvements on the property over the years and transformed it into a nursery and community park. The park is at present open and accessible to members of the community. In order to obtain electricity and water for the nursery, Mrs Gianchandi utilised the water and electricity from the neighbours and reimbursed them for such use. The running costs of the park was approximately R16,000 per month and the improvements of the property to date was approximately R950,000. The revenue of the park and nursery was used to maintain the park.

Mrs Gianchandi approached the court in 2022 for an order that she acquired ownership of the land by acquisitive prescription and that the Registrar of Deeds must be ordered to allow transfer to her. She alleged that she had occupation of the property for 31 years; 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. She argued that she had complied with the elements of acquisitive prescription (as set out in section 1 of the Prescription Act). She stated further that although only eight hundred (800) square meters of the property was used for the nursery, the remaining property was used as a park and to store trees. She stated that she was unable to apply for the necessary water and electricity connections but paid for the water and electricity that she used.

Various neighbours of Mrs Gianchnadi confirmed that she had been using and occupying the property openly, with one of them confirming that he resided in the area longer than 31 years, and that she had used the property as a nursery and park for that entire period.

The registered owners of the property were two companies (named collectively herein ‘Park Estates’ companies). Both had been deregistered between 16 July 2010 and reregistered only in September 2020. Neither company had ever approached Mrs Gianchandi regarding her occupation and use of the property.

Ms Pillay, on behalf of one of the companies, stated in court that she and her husband acquired Park Estates in 1993 and they became directors of the entity in July 1993. Park Estates owns 39 plots of land in the area, including the property in question. The intention with acquiring the Park Estate company was to develop the plots for on-selling.

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Most of the 39 plots are, at present, undeveloped and covered in dense vegetation and are without services. Ms Pillay also stated that in consequence of financial constraints, Park Estates was deregistered in 2010 and re-registered in 2020.

Ms Pillay further confirmed that neither she nor her husband approached Mrs Gianchandi because the nursery was not visible when they drove past the property and they only recently became aware of the nursery. They initially assumed that the nursery was situated on a neighbouring property. (They did not indicate when or how often they actually drove past the property.)

Ms Pillay denied that Mrs Gianchandi had been on the property for 31 years. She also argued that there was no possession and control of the property "as owner" because, unlike what one would expect of an owner, Mrs Gianchandi:

- 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.

She also argued that possession was not "open" because the nursery and park were not visible from the road and were hidden behind the thick vegetation.

It was common cause that the water and electricity was indeed connected illegally; Mrs Gianchandi 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.

HELD

Legal requirements for acquisitive prescription

- Section 1 of the Prescription Act ('the Act') reads:

'Acquisition of ownership by prescription –

Subject to ... 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.'

- 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).
- 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. Mrs Gianchandi instituted the present application in April 2021 and service on the companies was effected in May, June and August 2021.

- 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 of the Act. The possession contemplated in section 1 is called civil possession and such possession has an objective and a subjective element, namely, physical possession coupled with *animus domini* (being the mental state of possessing as if one is the owner). The latter element covers both a *bona fide* possessor and the *mala fide* possessor. Possession in the *bona fide* but mistaken belief that one is the owner suffices. The fact that the person would not have had that state of mind if he had known the true facts is irrelevant in this context.

Analysis of the facts and law

- With regard to the illegal use of the property and the illegal electricity and water connection, Park Estates relied on *Swanepoel v Crown Mines Ltd* (1954, Appellate Division) where the Court refused to allow transfer of 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 section 38 of the Transvaal Gold Law Act of 1908 (T). The provision prohibited the use of the surface of the ground held under mining title, not the possession thereof. 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 was illegal in terms of the Transvaal Gold Law Act, ownership could not flow from illegal possession. That Court, however, conceded that there may be cases where possession may be separated from the illegality.
- The facts of this matter are 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 Park Estates legally owned the land and there was nothing to indicate that the requisite authorisations, if applied for, would not be granted.
- 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.

Possession 'as owner'

- The evidence confirms that Mrs Gianchandi was in possession of the property for at least the past 31 years, as owner.

Extent of the possession

- In as far as the extent of the possession of the property is concerned and the fact that parts of the property was not frequently used, the test in our law is whether "there was such use of a part or parts of the ground as amounts, for practical purposes, to possession of the whole". It is sufficient that use was made of the property in question "from time to time as occasion requires". Much depends on the nature of the property and the type of use to which it was put.
- In these circumstances, considering that the property was used as both a park and nursery, the fact that Mrs Gianchandi used certain portions of the property infrequently, does not detract from her possession.

CONCLUSION

In the premises, it was concluded that Mrs Gianchandi's possession of the land complied with section 1 of the Prescription Act and it was ordered that transfer into her name be effected.