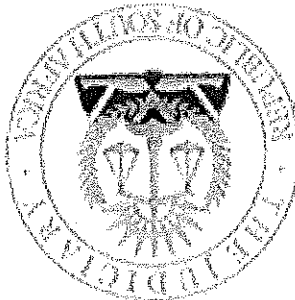


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2013/37921
Date of Hearing: 22 September 2016
Date of Judgment: 22 March 2017 2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
DATE 22/03/2017	
SIGNATURE	

In the matter between:

HING, MUN HON

Applicant

and

MKHABELA, SOLOMON SOLLY

Respondent

J U D G M E N T

HULLEY AJ

Introduction:

[1] This is an action that started out as motion proceedings for a declarator

that the plaintiff is the registered owner of certain immovable property being the Remaining Extent of Portion 21 of the Farm Drieziek No. 368 I.O. ("the property") and return of the property. The matter concerns the question of acquisitive prescription and enrichment claims.

The pleadings:

[2] The plaintiff alleged in his declaration that he was the owner of the property, the defendant had possession and was conducting various businesses thereon from which he earned a substantial income and despite demand continued to remain in unlawful occupation and possession of the property. The plaintiff asked for an order declaring that he was the registered owner of the property coupled with its return and the eviction of the defendant and all persons occupying through him. The plaintiff asked that the sheriff be authorised to give effect to the eviction order. The plaintiff seeks an order on the attorney and client scale.

[3] The defendant, on the other hand, pleaded that he had been in possession of the property since 1981, had never acknowledged the plaintiff's rights or those of any predecessor in title, that he had continued during that period to hold continuously, openly, without force and as if he were the owner and by virtue of these facts had become the owner in terms of s. 1 of the Prescription Act, 68 of 1969. In the alternative to the plea of prescription the defendant alleged that he became the registered owner of the property when he applied on or

about 30 April 2002 to the City of Johannesburg's ("the City's") Housing Department for registration of occupation and was in fact registered on or about 30 October 2006. The defendant further alleged that on or about 11 June 2002 he submitted building plans to the City which were approved and on or about 25 June 2002 he was granted permission to proceed with the erection of the buildings and that he applied for rezoning of the immovable property or about 20 July 2006 and subsequently applied for and obtained the necessary clearance certificates and approvals to build and operate the businesses located upon the property. He contends that his occupation is accordingly lawful.

[4] In an alternative plea the defendant alleged that he performed certain renovations, developments, erection of buildings and installation of utilities such as water supply, electricity supply, telecommunications and sewerage on the immovable property and in this regard spent in excess of R3 393 162.00 and that he had acquired an improvement lien over the property. The defendant alleged that these measures increased the value of the property from R767 880.00 as a vacant plot to R4 850 000.00 and the plaintiff was unjustifiably enriched.

[5] The defendant counterclaimed for a declaration that he is the owner of the property and directing the Registrar of Deeds to register his ownership. He also seeks payment of the amount of R3 393 162.00 together with interest thereon at 15.5% per annum from date of order

to date of payment.

[6] In his plea to the counterclaim the plaintiff denied that the buildings erected on the property and the services connected and/or installed were connected in a manner that was lawful, sound and in compliance with the relevant statutory and regulatory provisions and by-laws. He accordingly denied that the improvements were necessary or useful. He alleged that the defendant had, in any event, benefitted from the use and occupation of the property through the generation of a rental and other income and that such benefit should be set off against any amount expended by him on improvements. The plaintiff contended that in the event that an improvement lien is found to have been established this Court should exercise its powers against the grant of such lien because the defendant took occupation of the property unlawfully and in circumstances where his continued occupation of the property was nullified, the buildings erected on the property and the services connected to and/or installed on the property are illegal and add no value and furthermore because he has generated an income from his occupation.

[7] Before I embark upon a consideration of the other aspects, I should dispose of one aspect raised by the defendant. The plaintiff submitted a request for further particulars to which the defendant responded. Among the particulars sought by the plaintiff were details on how ownership was acquired by the defendant pursuant to registration of

his occupation with the City and whether this was in terms of any legislation. The defendant declined to provide details on how ownership was obtained, but indicated that no legislation was involved. There was no evidence to suggest that the City had purported to confer ownership and no suggestion as to how, from a legal perspective, it could do so, given that it was not the owner. It appears that the City was merely recording the defendant's occupation of the property. No evidence was led in support of this aspect and it was rightly not pursued in closing argument. I am satisfied that if the defendant had acquired ownership in this case, he did so solely under the Prescription Act.

[8] If the claim of prescription succeeds, there is no need to consider the enrichment claim.

Acquisition of ownership by prescription

[9] Before considering the facts of this matter, I should, briefly, outline some principles relating to acquisitive prescription.

[10] In terms of s. 1 of the Prescription Act, 68 of 1969 –

"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."

[11] In a nutshell, to acquire ownership of "a thing" by prescription, one must, either (a) personally or (b) both personally and through predecessors in title have "possessed" the thing both "openly" and "as if he were the owner" for an uninterrupted period of 30 years.

[12] Possession entails physical control (*corpus*) coupled with a mental attitude regarding control of that thing (*animus*). The person claiming ownership by prescription, must intend to acquire ownership of the thing (*animus domini*), i.e. he or she must possess the thing to the exclusion of the true owner. The two elements must coexist in time. Thus, if a person had physical control for a period of thirty years, but lacked the intention to acquire ownership for, say, the first two years, prescription would only begin to run from the moment the person formed the intention to acquire ownership, that is, in the third year, and not the moment he or she acquired physical control.

[13] The running of prescription is interrupted by the service on the possessor of a process "whereby any person claims ownership in that thing".¹ The words "claims ownership" may be used in a restrictive sense to refer to the prayer, where the cause of action is the *rei vindicatio*. It could also be used in a broader sense to mean a claim in which ownership is asserted. The latter would arise, for instance, where the plaintiff sues for eviction based upon an assertion that he is

¹ Section 4(1) of the Prescription Act

the owner. I am not aware of any case in which this issue has been considered.

[14] On 9 October 2013 the plaintiff instituted proceedings by way of notice of motion for the eviction from the property of the respondent and all persons occupying through or under him. He asserted, but did not claim, ownership in the narrow sense described above. The notice of motion was served on the defendant on 15 October 2013. On 18 November 2013 the defendant filed an answering affidavit and the plaintiff replied thereto.

[15] On 17 April 2014 an order was made referring the matter to trial. No indication was given therein of the terms on which the matter was referred to trial. The usual order is to direct that the notice of motion shall stand as the simple summons, the answering affidavit as a notice of intention to defend and the applicant is to file a declaration within a specified time; thereafter the rules governing trial proceedings shall apply (although the latter part need not be included in the order itself).² None of this was stipulated in the present order referring the matter to trial.

[16] At any rate, on 1 October 2014 the plaintiff issued his declaration. It is unclear precisely when the declaration was served on the defendant or what relief was sought therein (the declaration included in my papers

² Rule 6(5)(g); *Standard Bank of SA Ltd v. Neurgarten 1987 (3) SA 695 (W)*, at 709E; *Haupt v/a Soft Copy v. Brewers Marketing Intelligence (Pty) Ltd & Others 2006 (4) SA 458 (SCA)*, at 468I – 469 B

[19] The defendant commenced leading evidence first. He called a total of four witnesses, including himself to prove various aspects of his case.

The facts relating to the prescription claim

[18] Given the facts of the present case, I do not think it is necessary for me to decide which of the two meanings apply as the delay makes no difference to the outcome. In any event, neither party appeared to be alive to the issue: both counsel argued the matter on the assumption that the notice of motion would have interrupted prescription.

[17] Based upon the aforesaid summary, if the words "claims ownership" in s. 4 (1) is to be understood in the broad sense described above, the defendant would have to show that the requisites for prescription existed prior to 15 October 1983 and continued uninterrupted for 30 years thereafter. If, on the other hand, the words are understood in the narrow sense, it would mean that it was only when the declaration was served upon the defendant, that the running of prescription was interrupted. In this sense, the defendant would have to show that the requisites for prescription existed prior to 12 November 1984 and continued uninterrupted for a period of 30 years thereafter.

was amended). In its amended form the plaintiff seeks *inter alia* a declarator that he is the registered owner. The defendant delivered his plea on 13 November 2014. It is clear that the declaration must have been served upon the defendant by the latest 12 November 2014.

Other than himself the witnesses were Messrs Kulani Dumon Nkuna, Mr Joseph Dziruni and Travolta Thando Ngoma. The plaintiff, in turn, testified on his own behalf and called an additional four witnesses. The witnesses called by the plaintiff were (not necessarily in this order) his son, Mr Fabian Hing (to whom I shall hereinafter refer as Mr Hing, Jr.), Ms Heather-Ann Trumble, Mr George Frederick Rautenbach van Schoor and Ms Tasneem Najam.

[20] Under the present heading it is convenient to relate the facts first from the perspective of the plaintiff despite the fact that the defendant and his witnesses testified first.

[21] The plaintiff is a Chinese person. The history of the Chinese people in South Africa is an interesting if complex one. The South African Institute of Race Relations in 1966 said the following of the Chinese people living in South Africa:

"No group is treated so inconsistently under South Africa's race legislation. Under the Immorality Act [23 of 1957] they are Non-White. The Group Areas Act says they are Coloured, subsection Chinese ... They are frequently mistaken for Japanese in public and have generally used White buses, hotels, cinemas and restaurants. But in Pretoria, only the consul-general's staff may use White buses... Their future appears insecure and unstable."

[22] On 18 June 2008 the then Transvaal Provincial Division granted an order declaring that the South African Chinese People fell into the

definition of "black people" contained in s. 1 of the Employment Equity Act, 55 of 1998 and the definition of black people contained in s. 1 of the Broad-Based Black Economic Empowerment Act, 53 of 2003.³

[23] The narration from the SA Institute of Race Relations could not better describe the complexities that confronted the plaintiff and his family in the present case. Until 1980 they resided in a part of Klipptown that bordered on Eldorado Park, a township that had been designated by the apartheid government as a Coloured township under the Group Areas Act, 36 of 1966. The family ran a bottle store on the premises and resided in the back yard. In 1980 the authorities became aware of the plaintiff's presence in a Coloured township and he was instructed to relocate.

[24] It was in this context that the plaintiff with the assistance of an estate agent ascertained that a farm, Portion 21 of the Farm Drieziek No. 368, Registration Division IQ Transvaal, measuring 13,7548 hectares in extent (i.e. 137 548m²), was available for sale. For the sake of convenience I will refer to this land as "the Farm". Because the Farm was located in a so-called white area the views of the neighbours had to be sought first before he could purchase the Farm. This was done, they did not object to the presence of the Hing family and so the plaintiff concluded an agreement with the owner of the Farm, one Mr

³ *Chinese Association of South Africa & Others v. The Minister of Labour & Others* (Transvaal Provincial Division, Case No.: 59251/2007), ZAGPHC 174, a copy of this order can be obtained on (<http://www.saflii.org/za/cases/ZAGPHC/2008/174>). It should be noted that the website contains only the court order; there is no judgment.

Thomas Johannes Benadie. On 31 January 1980 the plaintiff purchased the Farm for R40 000.00. He paid for it in part by way of a substantial deposit and the balance was secured by way of a bond in favour of Mr Benadie.

[25] On 24 March 1980 the plaintiff concluded an agreement with Eskom for the supply of electricity to the Farm. He took occupation in April of that year and on 3 July 1980 the Farm was transferred into the name of the plaintiff.

[26] The Farm was situated to the west of the Golden Highway (the R553) in the south of Johannesburg, near the suburbs of Grasmere, Ennerdale and Lenasia.

[27] The plaintiff testified that when he moved onto the Farm it comprised *inter alia* a homestead with five bedrooms, a cottage and an informal structure. The plaintiff later erected a garage.

[28] The plaintiff lived on the Farm together with his four children: three daughters, Angela, Maggie and Natasha, and a son, Fabien. Natasha was the only child born on the Farm.

[29] There was some confusion whether the plaintiff's wife also resided on the Farm. He initially testified that she moved onto the Farm with the rest of the family but later stated that she continued living at the family

store in Eldorado Park. This differed from the testimony of his son, Mr Hing, Jr., who testified that Mrs Hing lived on the Farm, although she alternated between the Farm and the residence in Eldorado Park.

[30] The plaintiff testified that Maggie attended school at Mondeor High School and Fabien (Mr Hing, Jr.) and Angela at Eikenhoff Primary School. When Mr Hing Jr passed out of primary school he attended at Mondeor High School. Natasha, he testified, went to Forrest Hill Primary School.

[31] The plaintiff testified that he would drop the children off at school in the mornings and pick them up in the afternoons. On other occasions he relied upon his neighbour, a certain Mr Brogan, to drop them off. At a later stage Mr Hing Jr. would drop the two younger children off in the mornings.

[32] The plaintiff testified that Mr Benadie had grown peach trees on the Farm and that a farmhand, one Kieverts (whose surname was not mentioned), lived in the informal structure on the Farm together with his family. Kieverts tended to the peaches. This arrangement lasted for approximately six to twelve months before Kieverts left.

[33] The plaintiff tried his hand at maize farming. Precisely how long is unclear. He handed in an invoice issued by a company called Milling & Conveyancing Systems (Pty) Ltd dated 14 June 1982. It was for a

plain sheller with a 5.5 kW motor. (A sheller is a farm machine designed to draw the maize cob through a process that resulted in the kernels being stripped from the cob.) The plaintiff also kept a few sheep, but discovered that stock theft was rife, and after losing three sheep decided to sell the remainder.

[34] The plaintiff proved to have a brown thumb and his attempts at farming failed.

[35] The plaintiff erected a fence around the Farm, but thieves stole the wire and on one occasion a motorist knocked into the fence and damaged it.

[36] On 9 July 1987 the plaintiff concluded an agreement with an armed response company, Presto Security Systems CC, for the installation of security beams, panic alarms and other security devices. The plaintiff testified that by this stage crime in the area was on the rise and he needed to take measures to protect himself and his family.

[37] The plaintiff handed in a letter dated 26 February 1990 from Messrs Van Zyl, Attwell & De Kock addressed to the Director-General of the Department of Development & Planning. The letter reads as follows:

"Dear Sir

APPLICATION FOR PORTION 21 OF THE FARM DRIEZIEK
368 IQ TO BE DECLARED A DEVELOPMENT AREA

Application is made in terms of Section 33 of the Black Communities Development Act of 1984 (Act 4 of 1984) for the above farm portions to be declared development areas.

In the Sebokeng / Evaton Structure Plan of 1987, completed by Messrs Van der Walt, Jacobs and Kruger, Portion 21 of the farm Drieziek is identified as part of the hinterland of Sebokeng and Evaton. According to the Structure Plan, the hinterland of approximately 4000 hectares, will be sufficient to accommodate the housing needs of Sebokeng and Evaton to the year 2005. However, it has been experienced that in practice, once even are made available, the demand increases. It is anticipated that over 200 residential erven will be released through the development of the farm portion.

For purposes of the Structure Plan a preliminary geotechnical investigation was done for the hinterland area which indicated that no problems are envisaged in so far as residential development is concerned.

The area will in all probability fall under the jurisdiction of the Evaton City Council.

The farm is 13,7548 hectares in extent the locality of which can be found on the locally plan attached hereto.

In support of this application the following documents are annexed hereto.

Copies of the S G Diagram A5879/54.

Copy of the Title Deed, B37200/1980⁴.

Power of Attorney on behalf of the Mr Mun Hon Hing the registered owner of the property.

We trust the above is in order and your assistance in processing the application will be appreciated."

[38] What is apparent from this letter, which was handed in by the plaintiff, is that the application to declare the Farm a development area was submitted by the plaintiff himself. It suggests that by this stage the

⁴ It is clear that the reference to the Title Deed was in fact incorrect; it should have been to the Mortgage Bond; the Title Deed was in fact held under Deed of Transfer No. 30696/1980

plaintiff had lost interest in the Farm.

[39] An extract from Government Gazette No. 12608 of 13 July 1990 was also handed in by the plaintiff. It shows that on that date the Deputy Minister of Planning declared the whole of the Farm to be a development area in terms of s. 33(1) of the Black Communities Development Act, 4 of 1984 ("the Development Act").

[40] I do not intend going into the history behind this legislation.⁵ For present purposes suffice to state that the Development Act, prior to its repeal in 1991, allowed the then Minister of Constitutional Development and Planning to designate an area as a development area "in which townships may be established". A township was defined in the Act to mean –

"a group of pieces of land or subdivisions of a piece of land which are combined with public places and are used mainly for residential, industrial, business or similar purposes or are intended to be so used and which are shown on a general plan".

[41] Development of townships under the Development Act was to take place in terms of the Regulations Relating to Township Establishment and Land Use.⁶ In short, the Regulations stipulated that after approval had been granted for the establishment of a township, a general plan

⁵ J. Van Wyk, *Planning Law* (2nd ed.), pp. 48 – 49; 61
⁶ GN R. 1897 of 1986 (GG 10431 of 12 September 1986)

had to be lodged with and approved by the Surveyor-General⁷ and then with the Registrar of Deeds⁸, and a township proclaimed⁹.

[42] In the present case, this appears to be precisely what happened.

[43] The process for the establishment of a township resulted in the preparation of a general plan and its approval by the Surveyor-General under SG No. A8328/1991. A copy of the sub-divisional diagram was handed in. It portrays that two distinct erven: Portion 47, Drieziek Township and Portion 48 Drieziek Township. Portion 48 is described as Drieziek Extension 7 on the Surveyor-General's diagram. From what I can gather it is this portion that is described as the Remaining Extent of Portion 21 of the Farm Drieziek and to which I have given the epithet "the property".

[44] What is apparent from the chronology of events thus far is that the plaintiff had applied for the entire Farm to be declared a development area and the entire Farm was in fact declared a development area. However, for reasons that are not apparent, by the time the Surveyor-General approved the plans, a distinction was drawn between the larger portion, described as Portion 47, and the smaller portion, described as Portion 48. The plaintiff provided no insight into how or why this happened.

[45] At any rate, the plaintiff testified under cross-examination that at some stage during either 1990 or 1991, after the Farm had been declared a development area, he applied to the Transvaal Provincial Administration to expropriate his land.

[46] On 3 January 1992 the Transvaal Provincial Administration, acting in terms of s. 2 of the Expropriation Act, 63 of 1975, expropriated a portion of the Farm, approximately 12,5038 hectares (the exact size is recorded differently in different documents), leaving a significant portion still in the hands of the plaintiff. The transfer of the expropriated portion was registered in the Deeds Office on 26 March 1998 as Portion 47. The balance of the Farm remained in the name of the plaintiff and was registered as The Remaining Extent of Portion 21 of the Farm Drieziek 368 IQ. The dispute in this matter concerns this latter portion.

[47] It was suggested to the plaintiff that informal settlers were on the increase in the area by 1988 to 1989. He denied this and insisted that it only started becoming a problem in 1992 to 1993.

[48] The expropriation of only a portion of the land proved a problem to the plaintiff. He continued to write to and importune the Transvaal Provincial Administration to expropriate the remaining land. On 29 July 1993 he wrote to a Mr Van Rensburg at the Administration and pleaded that "the expropriation be dealt with as soon as possible"

because it had "become very difficult to reside on the property" because "the area has become extremely dangers (sic)".

[49] The plaintiff testified in chief that he and his family moved off the property in 1996, but under cross-examination stated that he had in fact moved off the property in 1994. (The plaintiff's counsel in fact put it to the defendant that the plaintiff left the property in 1994.) He presented a document to the court signed by his wife, Mrs Hing, on the one hand, and a certain Mr Buytendag, on the other. The letter records that Mrs Hing handed over the keys to the property to Buytendag of the Department of Public Works on 1 August 1996. Mrs Hing has since passed on.

[50] Mr Hing, Jr. testified that he and his family moved onto the Farm in 1981. He was approximately 10 years old at the time. His eldest sister, Magdalena, was 11 years old at the time and Angela was 5 or 6 years old. I pause to point out that on the version of Mr Hing, Jr., Angela was the second youngest; whereas the plaintiff testified that she was the eldest.

[51] His mother lived on the farm in the initial years after Natasha was born. Later she would alternate between the farm and the bottle store. His father also alternated between the farm and the bottle store.

[52] According to Mr Hing Jr. he attended Aloe Ridge Primary School.

[53] Mr Hing Jr testified that his father dabbled in maize farming. He also family acquired the Farm a farm hand named Kieverts lived on the Farm together with his wife. They had two children, one of whom was an older boy. It appears that Kieverts' son was close to the Hing children. He would often carry Angela to the bus stop on those occasions that she awoke late for school and would wait for their return in the afternoons. Kieverts and his family lived in a zinc structure on the Farm. They remained for approximately one year before the plaintiff instructed Kieverts and his family to leave. Apparently the plaintiff felt that Kieverts was responsible for the loss of the sheep.

[54] Mr Hing Jr testified that once they moved to high school, the family moved to Eldorado Park in order to be closer to their school. Precisely when this occurred is uncertain.

[55] According to Mr Hing Jr the family left the property in 1994 due to the increase in informal settlers in the area. He stated that informal settlers started becoming a problem some time towards 1991 or 1992; by 1994 most of the neighbours' farms had been expropriated. The Hing family was among the last to leave.

[56] Mr Hing Jr said he thought his mother had hired somebody to stay on the farm between 1994 and 1998.

[57] I should note that there were a number of contradictions between the plaintiff and his son, of varying degrees of importance. Between them they confused the order of the children. The plaintiff was unable to recall various facts, especially under cross-examination. I was of the view that the plaintiff's lapses in memory were largely attributable to his advanced age. Indeed, Mr Hing Jr. testified that his father's memory was "not always 100 percent".

[58] The defendant, on the other hand, testified that he moved onto the property together with his parents and seven siblings in 1980 (it seems that the seven siblings included the plaintiff). He was approximately 11 years old at the time. He lived there together with his parents and his siblings. His eldest sister, who was born in 1957, passed away in 2011. His father, to whom I shall refer as "Mr Mkhabela, Sr.", is also deceased. The remaining siblings and his mother are all still alive. The defendant was born in 1969. He was the third youngest of his parents' children, the two youngest, twins, were born in 1974. He has two older sisters who are still alive, one born in 1960 and the other in 1967. He also has an older brother who was born in 1964.

[59] According to the defendant the family resided in an informal structure on the property. He and his older siblings schooled in Mpuumalanga where they lived with their grandmother. Mr Mkhabela Sr. worked as a mechanic for an Afrikaner farmer named John. He could not recall

John's surname and I will refer to him throughout by his first name.

[60] John's homestead was approximately 500m to 800m south of the structure the defendant's father had erected. The defendant was unable to say whether the area they occupied was on John's farm, but he surmised that it was. In the defendant's words "if it [the area they erected their structure] was not his [John's] we would not have been allowed to say there". This is an implied acknowledgement of the precariousness of their occupation. The defendant and his family drew water from John.

[61] The defendant was adamant that the plaintiff and his family did not live on the Farm. He acknowledged that there was a homestead in the vicinity of where the plaintiff claimed to have lived. He was, however, unaware of any residents in that homestead. He claimed that the homestead had acquired the name "spook house" (ghost house), presumably because it was unoccupied and stories had begun to develop about its occupants. The defendant claimed that he had not known of the plaintiff's existence or ownership of the Farm until he received a letter of demand from the plaintiff's erstwhile attorney, at some point in 2011.

[62] At some point in approximately 1984 there were heavy winds that destroyed the Mkhabela family's structure. They were forced to relocate for a period of approximately three to four months in order to

enable Mr Mkhabela Sr. to rebuild the structure. He did so and they returned more-or-less to the same area that was occupied by the previous structure.

[63] The defendant alleged that Mr Mkhabela Sr. continued to work for John until the latter moved out in approximately 1988. Apparently, John had become fearful of the influx of informal settlers into the area.

[64] Mr Mkhabela Sr. passed away in 2001. At that stage the defendant was approximately 32 years old.

[65] The defendant testified that he commenced construction on the land in 2002 and erected palisade fencing around the portion of land over which he wished to claim ownership. This portion is significantly smaller than the area that I have described as the property. Enclosed within the palisade fencing are four buildings or structures and a parking lot. Two of them, marked as "A" and "B" on a satellite photograph, comprise the shopping centre. Another building, marked as "D" was a bakery that was only partially complete. A temporary structure with a corrugated iron roof was marked as "C" on the satellite photograph. It was erected by the defendant for patrons from the pub to lounge about. Substantial portions of the property are not occupied by the defendant at all. One portion is occupied by a taxi association and a taxi rank has been erected thereon. The taxi rank has been designated on the satellite photographs as "H". Another portion is

occupied by a day care centre.

[66] The co-ordinates of the portion of land that the plaintiff claims an interest in have not been marked out.

[67] Mr Van Schoor is a professional Town and Regional Planner. He had managed to unearth aerial photographs taken of the region in 1973, 1984 and 1991. The authenticity of the photographs was not placed in dispute. When substantially enlarged, one is able to observe what appear to be structures on some of these photographs. I am not inclined to place too much stock in these photographs, largely because it is difficult on the available evidence to tell whether structures that are present may not appear on the photographs. I understood that there may be circumstances in which a structure which is known to exist is not depicted on the aerial photograph because of the angle and colour of the roof of the structure.

[68] The versions advanced by or on behalf of the plaintiff and that of the defendant are in large measure mutually destructive. If the one version is true, the other almost certainly must be false.¹⁰ Of course, it is entirely within the realm of possibility that portions of the two contradictory versions may be true.

[69] The plaintiff's version has this to commend it: it is largely supported by

¹⁰ *National Employers' Mutual General Insurance Association v Gany* 1931 AD 187 at 199

contemporaneous documentation, some of which is official in nature. First, there is the title deed and the contract concluded with Eskom for the supply of electricity. These prove that the plaintiff purchased and took transfer of the property in 1980 and installed electricity thereon. These are objective facts. It would be surprising if the plaintiff purchased the property and installed electricity but then failed to take occupation. Secondly, there is the invoice for the purchase of farming equipment in 1982. This is consistent with the plaintiff's version that he conducted farming operations. It is inconsistent with the defendant's version. Thirdly, there is the invoice of Presto Security in 1987.

[70] On the other hand, there is the letter from Messrs Van Zyl, Attwell & De Kock of February 1990 and the extract from the Government Gazette in July 1990. These both show that the Farm was declared a development area. The letter also reveals that the decision to apply for it to be declared a development area was that of the plaintiff. This demonstrates an intention on his part to get rid of the Farm. In my view, it is unlikely that the defendant formed this intention overnight. The seeds had probably been planted earlier. The plaintiff would have had to investigate the issue and seek legal advice before deciding to have the Farm declared a development area. This would have coincided more-or-less with the defendant's version of the influx of informal settlers into the area. It does not necessarily prove that the plaintiff had moved out at that stage. The fact that the plaintiff and Mrs Hing were actually residing at the store in Eldorado Park suggests that

the authorities had become more lax in their observance of the Group Areas Act. With the intensifying of the perceived threat on the Farm, it is not difficult to imagine that the Hing family may well have abandoned the property as early as 1990. I do not think I need decide this issue.

[71] Against this, one must bear in mind that to establish his claim of

ownership the defendant had to prove that he and any predecessor in title had held the property prior to either 15 October 1983 or 12 November 1984, depending upon which meaning one prefers for the words "claims ownership" in s. 4 of the Prescription Act. By November 1984, the plaintiff would have been a mere 15 years old. Reliance upon his testimony had obvious dangers. One would have expected to the defendant to call another witness who was more mature at the time. The defendant's mother was 79 years old at the time of these proceedings. No evidence was given of her state of health or her mental agility, but I do not think it a stretch to consider that she may have been too old to testify. But the same cannot be said of the two older siblings. One would have expected either of the two older surviving sisters, who would have been approximately 20 years and 16 years old, respectively, in 1980, to testify. No explanation was provided for their failure to testify. If there was any reason why they were unable to testify, I would have expected that information to come from the defendant. At any rate, the maturity and insight of the two older siblings would have made them more reliable and credible witnesses than the defendant, who was but a young boy when most of

the events critical to the claim of prescription unfolded. The failure to call them as witnesses undermines the defendant's version.

[72] Wherever the probabilities may lie, I do not think the defendant can succeed in a claim for prescription. On the evidence presented by the defendant, I am at a loss to understand when, according to him, his father, Mr Mkhabela Sr., formed the necessary *animus* to acquire ownership. On the defendant's version, it appears Mr Mkhabela Sr. understood that John was probably the owner of the land on which their informal structure had been erected. No direct evidence was given of Mr Mkhabela Sr.'s intention. To give credence to his intention one would, in any event, require some objective manifestation of that intention. The defendant provided little detail of the type of structure that was erected or the type of materials used. What is clear is that it was blown over during a storm and appears to have been of a less robust and non-permanent nature. Moreover, the family relied upon John for water. In the circumstances, the only external manifestation of Mr Mkhabela Sr.'s intention suggests that he did not regard the land as his own. It seems likely that the first time an intention was formed to acquire ownership of the land was after the death of Mr Mkhabela Sr. in 2001. It was only after the death of his father that, on the defendant's version, any attempt was made to erect a structure that was of a permanent nature.

[73] In the circumstances, I am satisfied on the available evidence that the

plaintiff did not acquire the property by prescription. His claim for prescription must therefore fail.

The enrichment lien and the claim for expenditure:

[74] Although the two may co-exist and often are determined in the same proceedings, a distinction must be drawn between, on the one hand, the assertion of a lien as a defence against the *rei vindicatio* and, on the other, a claim for expenditure incurred on another's property. The two are inextricably interwoven and inevitably a discussion of the one will entail a discussion of the other. But it is important to bear in mind that the principles applicable to the one are not identical in all respects to those applicable to the other.

[75] A lien is a 'right'¹¹ of retention (*ius retentionis*) enjoyed by the holder of the lien (the *retentor*) over the property of another. It arises by operation of law¹² from the fact that one person has 'put money or money's worth into the property of another'¹³ and has as its object the securing of payment for the holder's expenses¹⁴. The obligation to compensate the retentor may arise from various sources including unjust enrichment.¹⁵

¹¹ A lien is not a "right" in the true sense since it is available only as a defence against a challenge to one's occupation or possession of property: see Sonnekus, *Tydskrif vir Suid Afrikaanse Regs*, (1991), 464 – 7; Silberberg & Schoeman's *The Law of Property* (5th ed.), pp. 417 – 418
¹² See the work of T. J. Scott, *Lien*, in Joubert (ed.), *The Law of South Africa* (First Reissue), Vol. 15, § 50
¹³ *United Building Society v. Smoother's Trustees and Golombick's Trustees* 1906 TS 623, at 626 – 627
¹⁴ *Goudini Chrome (Pty) Ltd v. MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A), at 85A – C
¹⁵ J. du Plessis, *The South African Law of Unjustified Enrichment* (2012), p. 289

[76] Liens may be classified into two principle types: debtor-creditor liens and enrichment liens (improvement and salvage liens).

[77] A debtor-creditor lien arises as a result of one person (the creditor) undertaking work on the property of the other (the debtor). The lien arises from the relationship between the parties to the agreement and is accordingly a personal right. The present case is not concerned with these types of liens.

[78] An enrichment lien arises from a relationship enjoyed by the *retentor* with the property; there may be no relationship at all between the *retentor* and the owner of the property. As such, an enrichment lien gives rise to a real right. As noted above, enrichment liens fall into two distinct categories: salvage liens and improvement liens.

[79] So much, thus far, on the principles relative to liens. I will pick up the discussion shortly.

[80] Turning now to claims in respect of expenses incurred on another's property. Our law distinguishes between three categories of expenses and corresponding improvements;¹⁶

(a) Necessary expenses (*impensae necessariae*) which are expenses incurred by one in the preservation or conservation of the property of another.

¹⁶ *Lechoana v. Cloete & Others* 1925 AD 536, at 547

(b) Useful expenses (*impensae utiles*) incurred on the property. Useful expenses are those which although not necessary, improve the usefulness and possibly the economic value of the property.

(c) Luxurious expenses (*impensae voluptuariae*) are those that are neither useful nor necessary, but serve only to adorn and sometimes increase the value of the property.

[81] A lien is *never* available in respect of luxurious expenses. But that does not, however, mean that there is no *claim* in respect of luxurious expenses; in certain circumstances, such a claim may lie. For instance, where the owner intends to retain the improvements or to sell the property and the market value of the property has been increased by the luxurious expenses, a claim will lie.¹⁷

[82] The distinction between salvage and improvement liens is important. Both types of lien are available to a *bona fide* possessor (one who honestly but mistakenly believes that she is the owner, but is not¹⁸). The position in relation to the *mala fide* possessor (one who knows that she is not the owner, but conducts herself as though she were¹⁹) is less settled in modern South African law.

[83] In Roman Law the *mala fide* possessor lost all title to any form of improvements made to the immovable property of another. Justinian

¹⁷ See the work of C. G. Van der Merwe, *Things*, in Joubert (ed), *The Law of South Africa* (First Reissue), Vol. 27, §284
¹⁸ Van der Merwe, *op cit*, §283
¹⁹ Van der Merwe, *op cit*, §283

wrote:

"... in this case [where one builds upon the immovable property of another] the owner of the materials loses his property, because he is presumed to have voluntarily parted with them, that is, if he knew he was building upon another's land ... Of course, if the person who builds is in possession of the soil, and the owner of the soil claims the building, but refuses to pay the price of the materials and the wages of the workmen, the owner may be repelled by an exception of *dolus malus*, provided the builder was in possession *bona fide*. For if he knew that he was not the owner of the soil, he is barred by his own negligence, because he recklessly built on ground which he knew to be the property of another."²⁰

[84] In modern South African law, however, although the weight of authority favours the view that the *mala fide* possessor has a claim in respect of both necessary and useful expenses²¹ some authors doubt that such right extends also to useful expenses²². What is less settled and more controversial is whether such a possessor enjoys also a right of retention to secure his claim for necessary and useful expenses.²³

[85] A court apparently has a discretion when it comes to useful expenses to determine whether it is reasonable in the circumstances to allow the

²⁰ The Institutes of Justinian (Lib. II, Tit. 1, §30), translation by T. C. Sanders
²¹ Groenewegen *De Legibus Abrogatis* ad Inst 2.1.30; Voet *Commentarius ad Pandectas* 5.3.21, 5.3.23, 6.1.36 (Gane's Translation, Vol. 2 at pp. 196, 199 and 250 – 251); Vinnius *In Inst* 2.1.30 (5); Van Leeuwen *Censura Forensis* 2.5.10 2.11.7 and 8. See also *Bellingham v Bloommeijer* 1874 Buch. 36, at 39; *Campbell v Golden Crescent Gold Mining Co* (1890) 3 SC 248; *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159, at 173; *Banjo v Sungrown (Pty) Ltd* 1969 (1) SA 401 (N), at 407E.
²² Silberberg & Schoeman, *op cit*, pp. 314 – 315
²³ Scott, *op cit*, §57; Van der Merwe, *op cit*, §285

possessor a claim.²⁴ Thus, if the owner is willing to allow the possessor to remove the improvements and the possessor refuses to remove them, it may be inequitable to afford the owner a claim.²⁵ Where it is determined that the plaintiff has a claim, the amount awarded is the lesser of the plaintiff's impoverishment and the defendant's enrichment at the time when the proceedings were instituted.²⁶

[86] It is not necessary for me to settle the controversy over whether a *mala fide* possessor enjoys a right of retention. I am satisfied that the defendant in the present case was a *bona fide* possessor. I will deal with this in greater detail later.

[87] A number of witnesses testified on the claim for improvements. The defendant testified that he had built up some savings from his employment and a small business he ran. He decided to use these savings in building on the land. In 2002 he and his family vacated the property and graded the premises. In 2003 he erected a palisade fence and in 2004 started building works. He produced what purports to be a building plan of a liquor store, butchery and restaurant. The authenticity of this document was strenuously challenged. The plans were prepared by a draughtsman, Mr Dziruni.

[88] The defendant produced various invoices issued by SHM Stell

²⁴ J. Du Plessis, *The South African Law of Unjustified Enrichment* (2012), p. 281
²⁵ *Meyer's Trustee v. Malan* 1911 TPD 559, at 568 – 569
²⁶ Du Plessis, *op cit*, p. 378

Designer, Felix Building Material CC and Spaza Hardware CC, Mabuse Trading and De La Mine Architectural Projects CC. The authenticity of these invoices was also challenged. The invoices purporting to be issued by SHM were for various materials including the supply and erection of palisade fencing and gates. Felix Building's invoices included the supply and fitting of roller shutter doors and concrete paving. Spaza Hardware's invoices were for building materials; Mabuse's invoices for the fitting of ceilings and window glass and floor tiling. De La Mine's invoices were for the supply and installation of plumbing materials, including toilets, basins and geysers.

[89] The defendant arranged with Eskom for the supply of electricity to the property. According to the documentation submitted by the defendant the work entailed the installation of "17m of service cable via a trench" taken from a transformer and terminating "into a new 50kVA conventional supply on the boundary of the property". The defendant was responsible "at your own expense" to "provide, erect, connect up, operate and maintain all circuits required to connect your electrical installation with the point(s) of supply/delivery and all equipment necessary for controlling such circuits". For the installation of the aforesaid Eskom charged the defendant an amount of R13 036.00 plus a security deposit of R2 600.00. The defendant also produced an electrical certificate of compliance.

[90] The defendant produced liquor licences issued in the names of

[91] The defendant had plumbing installed to the property.

[92] According to the defendant he had secured a number of tenants. A bottle store, butchery and supermarket have been operational since July 2007, a pub since November 2010, an internet café and a bakery since 2011, and a restaurant and hair salon since 2013.

[93] The defendant was, however, unable to produce a certificate of occupancy for any of the building works.

[94] Mr Nkuna was called as an expert property valuer. He was called to provide a valuation of the property. He prepared a report setting out the value of the land without improvements and its value with the improvements. He valued the land without improvements at R768 000.00, but noted that it could sell at between R600 000.00 and R1 000 000.00 on the open market "considering the current zoning, location and economic conditions". Based upon the income of the various businesses, Mr Nkuna estimated that the value of the property was R4 850 000.00. He testified, however, that the figure should in fact have read "R4 200 000.00".

[95] Mr Nkuna attempted to do independent research to verify some of the information supplied to him, but it is apparent that none of the

investigations yielded any meaningful results. In the end all the factual information contained in his report was given to him by the defendant. The defendant and Mr Nkuna contradicted each other on the source of some of the factual information. I cannot, in these circumstances, place any reliance upon the valuations performed by Mr Nkuna.

[96] Mr Dziruni testified that he was a draughtsman by profession. He was commissioned by the defendant to prepare the building plans of the shopping centre. The plans were completed in 2002. They included a bottle store, supermarket and butcher in the first block and a hardware, supermarket and clothing store in the second block. Mr Dziruni testified that the building plans need not be amended if changes were made to the internal walls. Mr Dziruni testified that the temporary structure that was marked as "C" on the satellite photograph did not require any building plans since it was of a temporary nature.

[97] According to Mr Dziruni the plans were lodged with the City's municipal offices in Region G. In his experience once the plans were approved the City would telephone the architect to come and collect the plans. In this case that is what happened. He testified that the words "Permission to Proceed" stamped on the plan was an indication that the plans had been approved.

[98] Construction commenced, he said, with the excavation of the trenches for the foundation. Thereafter a building inspector came to the site to

investigate whether construction was in accordance with the approved plans. The inspector approved the work. Thereafter the slab was laid and the inspector, once again, gave his approval. Mr Dziruni testified that the building inspector was an old man named Mr Tsotetsi.

[99] He testified that the process for submission of plans had changed since then. The plans were now kept in the City's offices in Region G which was located in Ennerdale. All plans relating to buildings in Orange Farm, Ennerdale, Lenasia and Eldorado Park were submitted to the City's offices in Region G.

[100] Mr Dziruni was not able to explain why his name, address and qualifications had not been affixed to the plans, as required in terms of the National Building Regulations and Building Standards Act, 103 of 1977 ("the Building Standards Act"). He testified that the provisions of this Act were not applied in Orange Farm. Despite this, he had prepared the plans in accordance with that Act.

[101] He was unable to explain why measurements on the plans were materially incorrect. He acknowledged that the measurements were incorrect and suggested that it was a "misprint". He testified under cross-examination that entire walls could be removed provided that a steel or concrete lintel was installed to support the structure.

[102] Mr Dziruni testified that it was not necessary to have a structural

engineer.

[103] He was unable to confirm whether the building was built according to plan.

[104] Mr Ngoma was a property developer. In 2015 he saw an advertisement on the internet. A copy of the advertisement was handed in. The advertisement was for the sale of the present property at a price of R9 500 000.00. It read:

"Vacant land whereby an application of commercial/industrial zoning has been lodged with the local town council for business. Please call for detailed plans ... total land measuring 12798 sqm. CALL NOW!!!"

[105] The advertisement contained the contact details of a Mr Piero Antiga, an estate agent.

[106] Mr Ngoma contacted Mr Antiga who, it turned out, worked for an agency called KVV Property. The two met. Mr Antiga was unable to inform him of precisely where the property was located but after checking through the file it was established that the property was the defendant's shopping centre.

[107] Mr Antiga explained that the owner wanted R9.5 million for the property because it had an existing footprint and businesses established on it. Mr Ngoma made an offer of R2 million, but made it clear that

ownership had to be established before any agreement could be signed. Mr Ngoma requested the title deeds which were eventually provided to him.

[108] Mr Ngoma telephoned the owner. He spoke to Mr Hing, Jr. who indicated that there was a building on the property with operational businesses and a liquor licence. Mr Ngoma indicated that he wanted to transform the property into a shopping mall and R9 million was simply not practical. Mr Ngoma suggested that Mr Hing Jr. obtain a valuation report.

[109] Mr Ngoma testified that he later discovered that there was a pending court case. He contacted the defendant who was not prepared to discuss the matter while the court case was pending.

[110] Mr Ngoma testified that although he had made an offer of only R2 million, "in my heart" he was prepared to go as high as R3 million. Mr Hing, Jr. testified that Mr Ngoma had in fact made an offer of R4 million, but he did not take the offer seriously. Mr Ngoma was not asked whether he was aware of the absence of approved building plans and whether he would have made the same offer if he knew that the building plans had not been approved.

[111] Ms Trumble is employed by the City of Johannesburg as a Chief Examiner, Plans within Building Control. She commenced employment

as a Plans Examiner in October 2000.

[112] Ms Trumble had considered the Surveyor-General's plans and could confirm that no building plans were submitted in respect of the property in question. Orange Farm had been incorporated into the City in 2000. She testified that all building plans had to be submitted to the City's Braamfontein Civic Centre.

[113] According to Ms Trumble the property was zoned as Agricultural. It could accordingly not be used for residential purposes save as set out in the deeds and certainly not for business purposes.

[114] She testified that building plans that were being considered for approval had to be disseminated among all the relevant departments, within the City. The departments numbered approximately eleven. These included the Johannesburg Fire Department, the Johannesburg Roads Agency, Johannesburg Water, Environmental Department and Engineering Department, to name a few. Each department had to record its consent to the proposed plans. Once each had consented, the building plans would be approved and this would be reflected on the plan itself. Two signatures would accompany the approval: one by the plans examiner recommending the approval and the other by the Building Control Officer, or his or her delegate approving it.

[115] Ms Trumble was asked to comment upon the building plans in the

[119] Ms Tasneem Najam was called by the plaintiff. She worked at Spaza Hardware. She confirmed that the defendant was a long-standing and regular customer of the store. She provided evidence that called into

[118] Mr Van Schoor confirmed that according to his investigations no building plans had been submitted in respect of the property.

[117] Mr Van Schoor confirmed that he had investigated the property and it was presently zoned as "Agricultural". He had submitted an application for the establishment of a township on behalf of the plaintiff. He stated that a land surveyor had to be appointed and a township register opened before the township could be established.

[116] Ms Trumble testified that building plans had to be submitted for the temporary structure as well.

of the engineer had to appear on the plans. building a structural engineer had to approve the plans and the details architect who prepared the plans. Moreover, given the size of the disabled, no public toilets and it did not reflect the details of the dimensions did not make sense, there were no facilities for the poorly prepared. It contained no fire plans, no escape routes, the the relevant department. She stated that the building plans were quite words "Permission To Proceed" because it did not have the details of present matter. She stated that it was impossible to make sense of the

[121] As indicated previously, I am of the view that the defendant was a *bona fide* possessor. I have already dealt with the circumstances under which he took occupation of the property (or a portion thereof). It seems unlikely, on the defendant's version, that Mr Mkhabela Sr.

[120] Before proceeding I should make it clear that I cannot accept the evidence of Mr Dziruni. There were too many errors in his plans and his evidence of their approval was never captured on the City's systems. I find it surprising that he did not consider it necessary to have a structural engineer approve the plans and his suggestion that properties in Drieziek did not have to comply with the Building Standards Act is clearly inconsistent with the wording of that Act and incorrect. I prefer the evidence of Ms Trumble and Mr Van Schoor.

question the authenticity of the invoices. Apparently the defendant had come to the store looking for any records that could be provided. He stated that his invoices had been lost and he required replacements. Her manager instructed her to assist the defendant and she did so. The plaintiff had ledger forms issued by the store that reflected the invoices numbers, dates and amounts issued to the defendant. The ledger forms did not reflect what material was supplied in respect of each invoice. Ms Najam transferred what information there was in the ledger to invoices. She used her experience to fill out the remaining detail regarding the building materials. The ledger reflected the address of the property as the delivery address.

[122] The plaintiff's counsel urged me to find that the defendant was a *mala fide* possessor. He likened the state of mind of the defendant in the present case to that of the defendant in *Grobler NO v. Bokhutsoeng Business Undertaking (Pty) Ltd & Others*²⁷. That case has features that resonate with the present, but on the important aspects relating to the state of mind of the defendant, it is wholly different. In that case, it

the process of becoming the owner.

to. I am accordingly satisfied that he genuinely believed that he was in addition, he cordoned off the portion that he wished to stake his claim manifested in the extensive construction work undertaken by him. In Unlike his father, the defendant's intention towards the land was The number of informal settlers in the area was on the increase. that the property had been abandoned and was simply lying fallow. unreasonable for the defendant who had resided in the area to assume and given the extensive period of the plaintiff's absence, it was not no visible measures to assert his ownership. In these circumstances, least eight years, possibly more. He had never returned and had taken By this stage, the plaintiff had been absent from the property for at defendant commenced construction work after the death of his father. have weighed with the defendant at all. What is clear is that the appeared to have hampered the defendant's father do not appear to recognised the limitations to his title. But the limitations which formed the intention to become the owner. He appears to have

[124] The plaintiff's counsel submitted that once the defendant's version of occupation since 1981 is rejected "it must be accepted that the defendant was alive to his occupation of the property being precarious as the plaintiff as the owner could seek to [assert] his rights at any stage". I do not see how this follows even as a reasonable inference, let alone an ineluctable one. The defendant was, after all, only 11 years old at the time his family came to occupy a piece of land. Whatever his state of mind may have been then, it is clear, is that he

[123] The plaintiff's counsel further points to efforts on the part of the defendant to fabricate evidence in support of his claim for prescription. I do not think that a party who in an effort to bolster his assertion that he acquired the property earlier than is found by the Court to be the case must necessarily be taken to be a *mala fide* possessor. In any event, the evidence presented by the plaintiff was not fabricated in the sense suggested by the plaintiff's counsel. It is apparent from the evidence of Ms Najam that the defendant had genuinely purchased building materials.

became aware of the adverse claim of the plaintiff. the fact that the defendant immediately terminated operations once he basis for such a finding in the present case. All the evidence points to knowledge continued building operations on the property. There is no came to realise that the plaintiff was the true owner, and despite such was apparent that the defendant, whatever his state of mind initially,

formed the intention to acquire ownership of the property once his father passed away.

[125] I think it must be accepted that the defendant's claim, if any, is limited to useful improvements. There is no evidence to show that any measures taken were for the preservation of the property.

[126] There is evidence that the plaintiff had made attempts to sell the property with the businesses in operation. This may well have attracted liability for the expenditure. The difficulty, however, is that the businesses cannot legally operate in their current state. The buildings plans need to be approved and the buildings need to be upgraded to comply with the approved plans. As things presently stand it is clear that the buildings have no emergency exits, do not have any facilities for disabled persons or toilet facilities for the public. The plans have not been approved by a structural engineer. The plaintiff cannot lawfully make use of the buildings in their current state and should he, given his present knowledge, sell the property in this state he would expose himself to potential claims, not only as against the purchaser, but in delict as against third parties who may be injured should the buildings, for instance, collapse. Additional moneys would have to be expended in order to regularise the use of the buildings. Moreover, it would probably take a while to do so. No evidence was led as to the measures that could be taken in order to regularise the situation. As testified by Ms Trumble, the building plans have to be submitted and

considered by various departments before they can be approved. Some aspects may require further investigation. I am called upon to pass judgment now on the evidence presently available to me. I am satisfied that the buildings although capable of being useful, are incapable of being used in their present state. I do not think it is within my power to make an order that will require the plaintiff to incur further expenditure before he may use the improvements except, perhaps, where the additional expenditure is insubstantial and the additional effort slight. In the present case I have no evidence as to the additional expenditure and effort required. *Prima facie* there is a substantial amount of additional work required, some of which may entail actual construction.

[127] Had there been evidence of the additional work involved, the attitude of the City regarding the extent of the delay and the likelihood of approval and a tender from the defendant for payment thereof I would have been inclined to uphold the enrichment claim. As things presently stand, however, I cannot do so.

[128] The plaintiff has, however, indicated that he would be prepared to permit the defendant to remove any improvements. No specific details of such an offer were given and I cannot include it in the order.

Order

[129] In all the circumstances, I make the following order:

129.1 It is declared that the plaintiff is the owner of the
Remaining Extent of Portion 21 of the Farm Drieziek
No. 368 I.Q.

129.2 It is declared that the defendant did not acquire
ownership by prescription.

129.3 The defendant and all persons occupying the aforesaid
property through him are ordered to vacate the
aforesaid property within 5 days of this Court order.

129.4 Should the defendant fail to vacate the property as
aforesaid, the sheriff is directed, with the assistance of
the South African Police, to evict the defendant and all
persons occupying the property under or through him.

129.5 The defendant is ordered to pay the costs of the claim
and the counterclaim, including the costs in respect of
the motion proceedings.


G I HULLEY
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

On behalf of the Plaintiff: B. M. Gilbert
Instructed by: Fluxmans Inc.

On behalf of the Defendant: **M. Jorge**
Instructed by: Peer Carrim Attorneys