Reportable

IN THE HIGH COURT OF SOUTH AFRICA

[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO: 1727/2003

In the matter between:

PLOUGHMANN NO	**Applicant**
(in her capacity as executrix in the Estate late Lorraine Myrtle Griessel)	
and	
CHARL CILLIERS PAUW	**First Respondent**
ELSABETH KRUGER	**Second Respondent**

JUDGMENT DELIVERED ON: 4TH AUGUST 2006

HJ ERASMUS, J

Introduction

[1] On 7th February 2003 Mrs Lorraine Myrtle Griessel brought an application by way of Notice of Motion against the first respondent. Mrs Griessel has in the meantime died and she was substituted as applicant by the executrix in her estate. In what follows, "applicant" is used to denote both Mrs Griessel in her capacity as such and the executrix. To avoid confusion when reference is made to events prior to the institution of these proceedings, I shall refer to Mrs Griessel by name.

[2] In her Notice of Motion, the applicant sought the following relief:

(a) An order for the eviction of the respondent from the applicant's property known as "Die Stroois" being Portion 6 (a portion of portion 2) of the farm Stofbergsfontein No 365, in the West Coast District Municipality, Division Malmesbury, Province of the Western Cape, in terms of Section 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998;

(b) An order determining the date by which the said respondent must vacate the said property;

(c) An order determining the date on which the eviction order in paragraph (a) above may be carried out;

(d) An order that the respondent pay the applicant's costs of suit.

In what follows, I shall refer to the property mentioned in paragraph (a) of the Notice of Motion as "Die Stroois" or "the property".

[3] The first respondent gave notice of his intention to oppose the application. Answering papers were in due course filed. The respondent resists the application for his eviction on the ground that he and his sister, Mrs Elsabeth Kruger, have by acquisitive prescription acquired joint ownership of the property; alternatively, that he has acquired the right of perpetual occupation by virtue of an agreement dated 31st January 1992.

[4] On 9th May 2005 Ndita AJ (as she then was) made two orders. The first was made by agreement between the applicant and first respondent *inter alia* as follows:

1. The main application is postponed for hearing from 26 May 2005 to 6 September 2005 on the following basis:

1.1 the main application is referred to trial;
1.2 the papers in the main application stand as pleadings for the purposes of the trial;
1.3 the Uniform Rules of Court applicable to trial actions shall apply to the matter from the granting of this order;

2. The order in paragraph 1.1, 1.2 and 1.3 above –

2.1 is made without prejudice to the respondent's right to argue *in limine* that the procedure by which the matter was instituted was incorrect, and that the case should be dismissed on that basis; and
2.2 is provisional upon the determination by the Court seized with the matter on 6 September 2005 of the issue in paragraph 2.1;

3. The parties will, in the event that the Court should find against the respondent on the aforesaid *in limine* point, be ready immediately to proceed with the trial action and will prepare in accordance with paragraph 1.3 above.

At the same time, Ndita AJ made the following order upon application by the applicant:

1. That Elsabeth Kruger is joined as a second respondent in the main action;

2. The applicant's attorneys shall serve a copy of the papers filed of record in the main application and of the order in the interlocutory application granted today on the said Elsabeth Kruger.

[5] An amended Notice of Motion was served on the second respondent on 29th December 2005. In the amended Notice of Motion, the eviction of the second respondent is sought along with that of the first respondent.

[6] The executrix in Mrs Griessel's estate deposed to the founding affidavit in the application as against the second respondent. The second respondent in her answering affidavit re-iterated the defence of prescription raised by the first respondent. She also raised objections to the manner in which she had been drawn into the proceedings.

[7] As a result of the death of the applicant, and the delay in the appointment of an executor, the matter could not proceed to trial on the agreed date of 6th September 2005. On 6th December 2005, by agreement between the parties (the parties being the applicant and both first and second respondent), Hlophe JP made the following order:

1. The application is postponed to 10th April 2006, on the same basis as set out in the order of Ms Acting Justice Ndita of 9 May 2005 ("the previous order").

2. The order remains subject to the reservation of the first respondent's right as contained in paragraph 2.1 of the previous order and subject to the proviso contained in paragraph 2.2 thereof.

3. The order is subject also to the reservation of the second respondent's right to take any *in limine* points relevant to her joinder and participation in these proceedings.

4. Paragraph 3 of the previous order continues to apply, and applies also to the second respondent.

5. The costs occasioned by the postponement will stand over for later determination.

[8] At the hearing, the applicant was represented by Mr André Gautschi SC and Mr J-H Roux; the respondents were represented by Mr Eduard Fagan.

The issues

[9] When the matter was referred to trial, no order was made for the filing of pleadings; it was ordered that the affidavits should stand as pleadings. At the commencement of the trial, counsel, at my request, listed the matters in issue between the parties.

[10] The matters in issue between the applicant and the first respondent are listed as follows:

1. The applicant is the registered owner of Portion 6 (a portion of portion 2) of the farm Stofbergsfontein No 365, in the West Coast District Municipality, Division Malmesbury, Province of Western Cape ("the property"). This is common cause.

2. The first respondent is in possession of the property. This is common cause.

3. Whether the first respondent has become the owner of the property by acquisitive prescription.

4. Alternatively to 3, whether the first respondent has the right of perpetual occupation by virtue of the supplementary agreement dated 31 January 1992 (Bundle 190—195).

5. Whether the first respondent, together with his predecessors in title (if any), possessed the property for more than thirty years.

6. Whether the first respondent, together with his predecessors in title (if any), possessed the property is if they were the owner thereof.

7. Whether the respondent waived all his claims to the property (whether as owner or occupier) in terms of the Deed of Sale concluded on 23 July 2001 (Bundle 266—283).

8. Whether the first respondent could in law become the owner of the property by acquisitive prescription in view of the provisions of the Subdivision of Agricultural land Act, No 70 of 1970 [I was informed from the Bar that the parties are agreed that the land in question was agricultural land].

9. Whether the first respondent as "joint owner" can in fact or in law obtain ownership by acquisitive prescription of the property where the other "joint owner" fails to establish her ownership by acquisitive prescription.

[11] The matters in issue between the applicant and the second respondent are listed as follows:

1. The applicant is the registered owner of Portion 6 (a portion of portion2) of the farm Stofbergsfontein No 365, in the West Coast District Municipality, Division Malmesbury, Province of Western Cape ("the property"). This is common cause.

2. The second respondent is in possession of the property. This is common cause.

3. Whether the second respondent has become the owner of the property by acquisitive prescription.

4. Whether the second respondent, together with her predecessors in title (if any), possessed the property for more than thirty years.

5. Whether the second respondent, together with her predecessors in title (if any), possessed the property openly.

6. Whether the second respondent, together with her predecessors in title (if any), possessed the property is if they were the owner thereof.

7. Whether the second respondent could in law become the owner of the property by acquisitive prescription in view of the provisions of the Subdivision of Agricultural land Act, No 70 of 1970 [I was informed from the Bar that the parties are agreed that the land in question was agricultural land].

8. Whether the second respondent as "joint owner" can in fact or in law obtain ownership by acquisitive prescription of the property where the other "joint owner" fails to establish his ownership by acquisitive prescription.

[12] A bundle of documents ("the Bundle") was prepared by the applicant in accordance with an agreement between the parties at a Rule 37 conference held on 27th March 2006. It was agreed that the copies of documents included in the bundle will, without further proof, serve as evidence of what they purport to be, subject thereto that any document already placed in dispute in the affidavits shall remain in dispute, and that

any party may, upon reasonable notice, require proof of any other document. It was further agreed that the truth of the contents of the documents is not admitted.

Issues raised *in limine*

[13] At the outset, Mr Fagan raised the issues *in limine* which were anticipated in the orders of Court made on 6th May 2005 and on 6th December 2006. He submitted that on the ground of the issues so raised, the application should without further ado be dismissed with costs. The issues raised *in limine* are the following: (i) the applicant should have proceeded by way of action and not by way of motion proceedings; (ii) the second respondent was joined without her knowledge and concurrence, and she has not agreed to the conversion of the application against her into a trial; and (iii) there has not been compliance with section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereafter "PIE"). I declined the application for the dismissal of the application. I indicated at the time that I would give reasons for my ruling in the judgment at the end of trial. The reasons follow.

The form of the proceedings

[14] The first point raised *in limine* is that the applicant should have proceeded by way of action and not by way of motion proceedings. In his answering affidavit, the first respondent states:

> Applicant knew all along … that my sister and I relied principally on our prescriptive title to Die Stroois. She was therefore well aware that I would

> resist any application for eviction, and that I had sound factual and legal grounds for doing so. She certainly can never have been in any doubt that there would be significant factual disputes in this matter, which were material and could never have been resolved in her favour on the papers …

Mr Gautschi submitted whilst the first respondent had in the past indicated that he had certain claims to Die Stroois, and had occupied it as owner, the applicant could not reasonably have anticipated that irresoluble disputes of fact would inevitably develop.

Mrs Griessel became the registered owner of the property on 13th May 2002 by way of a Deed of Partition Transfer. Neither respondent took any steps to prevent the transfer taking place. On 30th August 2002 Mrs Griesel, through her attorney, required the first respondent to vacate Die Stroois by no later than 30th November 2002. On 1st November 2002 the first respondent's attorney responded as follows:

> Ons kliënt is besig om die aangeleentheid te oorweeg en vir ons instruksies te gee en ons vra u om asseblief vir ons 'n tydjie toe te laat om terug te kom na u.

By the time the application was launched on 7th March 2003, and served on 12th March 2003, there had been no response to the letter demanding that the first respondent vacate the property and no indication of an intention to assert his claims to ownership by acquisitive prescription.

Moreover, on 23rd July 2001 the first respondent signed a Deed of Sale in the preamble of which reference is made to the fact that he has waived certain rights. Pursuant to the Deed of Sale he obtained a substitute property for a nominal amount. The waiver featured prominently during the trial and will be dealt with in some detail later in this judgment. At the

time when Mrs Griessel instituted the proceedings, she may have been justified (whether or not the view was in fact correct), also in view of the first respondent's lack of response to her letter of demand, in thinking that the issue of prescription was no longer alive.

The Court is given a wide discretion by Rule of Court 6(5)(g) which provides that –

> … where an application cannot be properly decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision …

The parties are ready to proceed with the trial and a dismissal would lead to an unnecessary waste of time, effort and costs.

In view of the foregoing and in the exercise of my discretion, I refused the application for the dismissal of the application.

The joinder of the second respondent

[15] The second point raised *in limine* is that the second respondent was joined without her knowledge and concurrence, and she has not agreed to the conversion of the application against her into a trial.

In his answering papers the first respondent averred that he and his sister, Mrs Elsabeth Kruger, have by acquisitive prescription acquired ownership of the property. In a letter dated 16th July 2004, the applicant's attorney requested the first respondent's attorneys –

> Kindly advise us whether Ms Kruger is, in the circumstances, willing to abide the court's decision in this matter or whether we need to consider joining her as a respondent in these proceedings.

On 23rd September 2004 the first respondent's attorneys replied –

> As far as Mrs Kruger is concerned, she has not been joined as a party and she definitely not abide by the court's decision. *(sic)*

The letter creates the clear impression that the first respondent's attorneys were acting also for the second respondent. The application for joinder was accordingly served on the first respondent's attorneys and the order was granted with their knowledge. They continued to represent the second respondent, filing on her behalf a notice of intention to defend and an answering affidavit, and briefing counsel to represent her at the trial.

The second respondent was joined by an order of Court. This was clearly done under the inherent power of the Court to order the joinder of a further party to an action which has already begun in order to ensure that persons interested in the subject-matter of the dispute and whose rights may be affected by the judgment of the Court shall be before the Court, and it also enables the Court to avoid multiplication of actions and to avoid waste of costs (see *SA Steel Equipment Co (Pty) Ltd and Others v Lurelk (Pty) Ltd* 1951 (4) SA 167 (T) at172H—173A; *Harding v Basson and Another* 1995 (4) SA 499 (C) at 501I).

In my view, the second respondent has been properly joined.

[16] When Ndita AJ granted the application for the joinder of the second respondent, she ordered the applicant's attorneys to serve on the second respondent a copy of the papers filed of record in the main application and of the order in the interlocutory application referring the matter to trial and postponing it to 6th September 2005. The second respondent contends that she was not a party to the agreement that the application be resolved "by way of oral evidence".

[17] The second respondent further contends that, because she was joined at a time when irresoluble disputes of fact had already manifested themselves in the application, the applicant should not have proceeded against her by way of application by joining her to the application, but should have proceeded against her by way of summons. Mr Gautschi submitted, rightly in my view, that it was clearly desirable, to avoid a multiplicity of actions, that the second respondent should have been joined at the time when the matter was referred to trial. The same result, but at greater cost, might have been achieved by the institution of a separate action against the second respondent and thereafter consolidating the action with the application/action against the first respondent.

In view of the foregoing and in the exercise of my discretion, I refused the application for the dismissal of the application against the second respondent.

Non-compliance with section 4(2) of PIE

[18] The third point raised *in limine* is that there has not been compliance with section 4(2) of PIE. Sections 4(1) and (2) of PIE provide as follows:

> (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by the owner or person in charge of land for the eviction of an unlawful occupier.
>
> (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

Subsection (3) provides that, subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed in the rules of Court. Subsection (4) provides that service must be effected in the manner directed by the Court if service cannot conveniently or expeditiously be effected in the manner provided in the Rules of Court. This is subject to the following proviso:

> Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

Subsection (5) provides as follows:

The notice of proceedings contemplated in subsection (2) must –

(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier
(b) indicate on what date and at what time the court will hear the proceedings;
(c) set out the grounds for the proposed eviction; and
(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

[19] The purpose of section 4(2) is –

> to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all the circumstances they allege to be relevant before the court.

(*Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 209I—J; *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) at 1229E—F; *Moela v Shoniwe* 2005 (4) SA 357 (SCA) at 362F).

The object of paragraphs (a) and (c) of subsection (5) is –

> … to inform the respondents of the basis upon which the eviction order is sought so as to enable them to meet that case.

(*Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 210A).

It has been held that the provisions of section 4(1)—(5) are peremptory (*Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) at 1227E —1228H; *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 209G; *Moela v Shoniwe* 2005 (4) SA 357 (SCA) at 362C).

[20] In *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 209G —H it was held that though the requirements of section 4(2) must be regarded as peremptory, it is nevertheless clear from the authorities that –

> … even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved.

This statement is cited with approval in *Moela v Shoniwe* 2005 (4) SA 357 (SCA) at 362E.

[21] With reference to a defective section 4(2) notice, defective in the sense that it did not fully comply with section 4(5)(c), it is said in *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 210A that –

> [t]he question is therefore whether, despite its defects, the s 4(2) notice had, in all the circumstances, achieved that purpose. With reference to the appellants who all opposed the application and who were at all times represented by counsel and attorneys, the s 4(2) notice had obviously attained the Legislature's goal.

At 210D—E it is stressed that the question whether a deficient section 4(2) notice achieved its purpose "cannot be considered in the abstract", and that the "answer must depend on what the respondents already knew". To hold the contrary, Brand JA says, would lead to results which are untenable:

> Take the example of a s 4(2) notice which failed to comply with s 4(5)(d) in that it did not inform the respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the application papers? Or if on the day of the hearing the respondents appeared with their legal aid attorney? Could it be suggested that in these circumstances the s 4(2) should still be regarded as fatally defective? I think not.

[22] In *Moela v Shoniwe* 2005 (4) SA 357 (SCA) no section 4(2) notice had been served on the local authority concerned. After reiterating that the object of the notice is to ensure that the unlawful occupier and the local authority are fully aware of the proceedings and that the unlawful occupier is aware of the rights referred to in section 4(5)(d), it is observed (at 362G) that it may well be that –

> … that object, in appropriate circumstances, may be achieved notwithstanding the fact that service of the notice required by s 4(2) had not been authorised by the court. This may, for example, be the case if at the hearing it is clear that written and effective notice of the proceedings containing the information required in terms of s 4(5) had in fact been served on the unlawful occupier and municipality 14 days before the hearing. Whether it would, need not be decided by us as there is no basis upon which it can be found that the municipality had been notified of the proceedings at all or that the municipality had any knowledge of the proceedings.

[23] This brings me to the facts of the matter before me. On 16th March 2006 Zondi AJ made the following order upon application of the applicant in these proceedings:

> Applicant is authorised and granted leave to serve the notice attached hereto marked "NOM 1" on the Manager, West Coast Municipality by telefaxing a copy thereof to the said Municipality at (022) 433 8484, in compliance with section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

The attached notice reads as follows:

> Take Notice that the abovementioned applicant intends making application to the above Honourable Court on Monday 10 Aprils 2006 and 10h00 or as soon thereafter as Counsel may be heard for orders in terms of its Notice of Motion.
>
> Take notice that:
>
> (a) This application is for the eviction of the respondents from from the property known as "Die Stroois" being Portion 6 (a portion of portion 2) of the farm Stofbergsfontein No 365, in the West Coast District Municipality, Division Malmesbury, Province of the Western Cape ("the property".
>
> (b) The application has been brought in terms of Section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of land Act No 19 of 1998 and is brought on the grounds that the respondents are in unlawful occupation of the property.
>
> (c) The application has been referred to trial by this Honourable Court.

(d) The respondents are entitled to appear before the above Honourable Court on 10 April 2006 at 10h00 to defend the case and, where necessary, have the right to apply for legal aid.

On the same day, the 16th March 2006, the notice was served on the Manager of the West Coast district Municipality by the sheriff of Moorreesburg/Hopefield.

[24] There was no service of the notice on the first and second respondents. They were, however, aware from the contents of the Notice of Motion that their eviction was being sought under the provisions of PIE. On 6th December 2005 they were parties to the agreement to postpone the matter for hearing on 10th April 2006. They were both legally represented and by 10th April 2006 their response to the application for their eviction had been fully documented in the papers filed on their behalf. I am of the view that there has been substantial compliance with the provisions of PIE and that the objects of section 4(2) of PIE have been achieved. In the circumstances and in view of the legal position set out in the judgments cited in paragraphs [19] to [22] above, I dismissed the objection raised *in limine* is that there had not been compliance with section 4(2) of PIE.

The West Coast National Park

[25] During the 1980's the SA National Parks Board (the "Parks Board") was in the process of expanding the West Coast National Park (the "Park") which is situated around the Langebaan lagoon on the West Coast. Certain of the land covered by the Park already belonged to the State. This included the admiralty zone around the lagoon. The Parks

Board did not have sufficient funds to purchase the land needed for the expansion and consolidation of the Park. Into the breach stepped the late Dr Anton Rupert who obtained funds from donors abroad. Mr F Stroebel ("Stroebel") was at the time the chief executive officer of the SA Nature Foundation. He said in evidence that Dr Rupert requested him to enter into negotiations with the State with a view to the establishment of a trust which would assist the Parks Board to establish new parks or to expand existing ones. Such a trust was duly formed (the "Parks Trust") and Stroebel became one of the trustees. Thereafter Stroebel became intimately involved in the negotiations for the purchase of land around the Langebaan lagoon. The negotiations dragged on for many years and Stroebel remained involved even after he had left the SA Nature Foundation and moved to another executive position. The basic scheme was that the land was purchased by and transferred to the Parks Trust which then transferred the land to the Parks Board on ninety-nine year leasehold. In the case of certain of the farms, the position in regard to ownership was complex and the basic pattern had to be deviated from in order to make provision for the needs of the local population. The farm Stofbergsfontein was one such case.

The farm Stofbergsfontein

[26] The farm Stofbergsfontein 365 was first surveyed and registered in 1820. It is said that as early as 1826 the first farmhouse, Die Stroois, was built by one Caswell. The descendants of Caswell retained a share in the ownership of the farm at the time of the establishment and expansion of the West Coast National Park. In October 1988 consultants submitted a report containing proposals for the development of Stofbergsfontein within the context of the West Coast National Park. In their report, the

consultants refer to the confused position in regard to the ownership of the farm. At the time of the report there were twenty-nine owners of the farm, some of the owners being private companies. They were all joint owners at the time, each joint owner having a proportionate share of the ownership of the farm as a whole. Griessel was the most significant single owner, holding 25 per cent of it; the proportionate share of other owners differed, certain owners having only a 1/640th share. In the documentation, these co-owners are referred to as "shareholders".

[27] Over the years, two traditional settlements arose on the farm, Bossieskraal Village and Stofbergsfontein village. The latter is adjacent to the town of Churchhaven which is located on a separate farm. In the report of the consultants it was proposed that the existing settlements on the farm should be consolidated and upgraded.

[28] On 24th December 1991 an agreement (hereafter "the Agreement") was entered into between the Parks Board, the Parks Trust and the "Shareholders of the Remainder of the farm Stofbergsfontein". It is a lengthy and complex agreement, the essential terms of which, for present purposes, were (i) the farm was sold to the Parks Trust, and (ii) the shareholders were allocated specific plots. The existing "farmhouses" were also allocated to shareholders. In terms of the agreement, Die Stroois was allocated to Griessel.

[29] 0n 31st January 1992 the parties entered into a supplementary agreement (the "Supplementary Agreement") which again deals with, *inter alia,* the allocation of the farmhouses, including Die Stroois, to Griessel. In terms of the Supplementary Agreement, Griessel "accepts and agrees" that the existing occupiers of the farmhouses have "usage and

occupation rights". The first respondent's claim to a right to occupy Die Stroois arises from the terms of the Supplementary Agreement.

[30] By reason of the massive amount of paperwork involved, the Agreement between the Parks Board, the Parks Trust and the shareholders took a long time to be implemented. Transfer of Die Stroois to Griessel was effected on 13th May 2002. Hence the following statement in her founding affidavit:

> As I only became the registered owner of the Property on 13 May 2002, I was prevented from bringing any application to eject the respondent from the cottage sooner. Furthermore, any such application would have had to have been brought in the name of all the former joint owners, which total 26 in number and include many deceased estates and various companies, as is apparent from the Deed of Partition Transfer.

Order of discussion of the issues raised

[31] The issues raised on the papers will be discussed under the following heads:

1. Prescription.

2. Waiver.

3. Perpetual occupation.

4. The second respondent's position.

5. The provisions of the Subdivision of Agricultural land Act, No 70 of 1970.

6. Acquisitive prescription by joint possessors.

Prescription

[32] The first and second respondent's father, the late Mr Callie Pauw, took occupation around 1970 of a derelict structure on the southernmost side of Stofbergsfontein, next to a cottage locally known as "Meraai se huisie". On 28 December 1973 Mr Callie Pauw together with one Thomas William Barsby acquired from one Henry William Stringer ("Stringer") the latter's rights to Die Stroois. The document, which is in the handwriting of Mr Pauw, falls into two parts. The first part reads as follows:

> I Henry William Stringer hereby agree to cede my right and title to the cottage on Stofbergsfontein to Thomas Valentine Barsby and Carel August Pauw.
>
> The compensation will be R150 payable against occupation.
>
> Signed at Stofbergsfontein on the 28th Day of December 1973.

The signature of Stringer follows.

Two weeks later, one Thomas William Barsby made over his rights to Mr Pauw. The second part of the handwritten document records:

> I, Thomas William Barsby hereby cede my interest in the above cottage to Carel August Pauw for the consideration of one hundred Rand R.100.00
>
> Signed at Stofbergfontein on the 13th of January 1974.

The signature of TW Barsby follows.

According the first respondent, the person named Thomas Willam Barsby in the second part of the document, is in fact the same person whose names are erroneously given as Thomas Valentine Barsby in the first part of the document.

[33] On 2nd February 1976 Mr Callie Pauw entered into a written agreement with George Albert Barsby for the purchase of one-twentieth of Barsby's share in Stofbergsfontein. The purchase price was R300.00. According to the list of Registered Owners of the Farm Stofbergsfontein" annexed to the Agreement, George Albert Barsby was the registered holder of a 1/480th share in Stofbergsfontein.

[34] Mr Callie Pauw continued to occupy Die Stroois until his untimely death in 1982 by drowning in the lagoon. During his lifetime, he made improvements to the cottage which included replastering, replacement of the thatch roof, replacement of floors, and extensive renovation of the plumbing. After Mr Pauw's death, the respondents took possession and occupation of Die Stroois which they regularly used as a holiday cottage. They maintained the cottage in good condition and again replaced the thatch roof. The respondents aver that, like Mr Callie Pauw, they have openly occupied Die Stroois as if they were the owners and that they have acquired ownership of the property by acquisitive prescription.

[35] Stringer deposed to an affidavit which forms part of the applicant's replying papers in which he sought to undermine the factual basis of the respondents' claim to prescriptive title. When called to give evidence, he largely disavowed the contents of his affidavit. He was a thoroughly unreliable witness, but what does emerge from his evidence is that he rented Die Stroois and that he did not occupy as owner or as if he were the owner. Acquisitive prescription did not commence to run while he was in occupation.

[36] It is clear, and confirmed by the first respondent, that Mr Callie Pauw knew that Stringer was not a registered owner of Stofbergsfontein. In other words, Mr Callie Pauw knew that he had not acquired ownership from Stringer and accordingly knew that he was not occupying Die Stroois as owner. Mr Fagan submitted, rightly, that the Prescription Act 68 of 1969 does not require a claimant under its provisions to be the owner of the property (for there would then be no need to claim prescriptive title), but rather that the claimant should possess the property "as if he were the owner" (see *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) at 680C—D; *Bisschop v Stafford* 1974 (3) SA 1 (A) at 9B: "holding as if of right"; DL Carey Miller (with Anne Pope) *Land Title in South Africa* (2000) at 173—174).

[37] Mr Callie Pauw's will and the liquidation and distribution account in his estate did not include Die Stroois among his assets. Why the one-twentieth of George Albert Barsby's 1/480th share in Stofbergsfontein, which Mr Callie Pauw had purchased in 1976, does not feature his will and the liquidation and distribution account in his deceased estate is part of the mystery that surrounds that transaction.

[38] All this still begs the question whether Mr Callie Pauw possessed openly and as if he were the owner. Mr Gautschi submitted that the rights Mr Callie Pauw acquired from Stringer were the rights of occupation as a tenant. He further submitted, and I quote from his written Heads of Argument, "it is probable that Mr Callie Pauw knew *[that Stringer was a rent-paying tenant]*, and considered himself to be a tenant, whether or not he paid rent".

[39] The position of Mr Callie Pauw was indeed confused and confusing. One gains the impression that Mr Callie Pauw, who had knowledge of the law of property, was anxious to find some legal base to underpin his occupation of Die Stroois. He acquired certain rights by way of cession from Stringer and Thomas William Barsby, but what those rights were is by no means clear. From Stringer, Mr Callie Pauw could have acquired no more than his rights of occupation as a tenant. What rights he acquired from Mr TW Barsby is not apparent on the evidence. After the ostensible purchase of one-twentieth of Mr GA Barsby's share in Stofbergsfontein, Mr Callie Pauw would have occupied Die Stroois as co-owner in undivided shares. A person cannot acquire prescriptive title to property the ownership of which is legally vested in him already (*Ex parte Puppli* 1975 (3) SA 461 (D) at at 463E).

[40] The evidence does not, in my view, support a conclusion that Mr Callie Pauw possessed as if he were the owner. Acquisitive prescription did not, therefore, commence to run while Mr Callie Pauw was in possession. Prescription began to run in 1982 when the first and second respondents took possession of Die Stroois after the death of Mr Callie Pauw. Both the first and the second respondent therefore fall short of the

30 year period required in terms of section 1 of the Prescription Act 68 of 1969. In the case of the first respondent, the running of prescription was interrupted by the service of the Notice of Motion on him on 7th February 2003. In the case of the second respondent, the running of prescription was interrupted on 29th December 2005 when the Notice of Motion was amended so as to seek her eviction along with that of the first respondent (see *Brandon v Minister of Law and Order and Another* 1997 (3) SA 68 (C) at 75E—F).

[41] If it were to be accepted that the period of acquisitive prescription commences with Mr Callie Pauw at the end of 1973 / beginning of 1974, the first respondent still falls short of the requisite 30 year period. The position of the second respondent would be different: in her case the interruption of prescription on 29th December 2005 would come after completion of a period of thirty years. The applicant contends, however, that even if the second respondent qualifies in terms of the period of possession, she did not acquire prescriptive title by reason of the fact that she did not possess openly as if she were the owner.

Waiver

[42] The applicant's attitude is that the first respondent has, in any event, waived all rights to Die Stroois.

[43] The evidence of Stroebel (who, I must emphasise, was a most impressive witness whose evidence I accept without reservation) throws important light on the first respondent's waiver of rights. The following snatches from his evidence are apposite:

> Dit het juis dan daartoe aangelei dat wanneer daar sekere probleme ter sprake gekom het, is ek soms ingeroep om met die gemeenskap te praat en in hierdie spesifieke geval het dit toe uitgekom dat daar aanspraakmakers is in hierdie gemeenskap wat aangedui het dat hulle bepaalde regte daaroor sou beskik en dit het 'n probleem veroorsaak omdat die gemeenskap daar aangedui het dat hierdie persone het nie regte daar nie en hulle is nie bereid om hierdie persone te akkommodeer nie.

The first respondent was one of the people who claimed certain rights and, as Stroebel said, members of the community (shareholders) were not prepared to sign any agreement with the Parks Board or Parks Trust unless the situation around his claims was resolved:

> Uiteindelik het ons toe gesê maar kan ons nie dalk vir mnr Pauw – kan ons nie die probleem verwyder deur een van ons erwe *[ie an erf belonging to the Parks Trust]* vir mnr Pauw te gee. Dit aan die gemeenskap oor te dra dat mnr Pauw 'n erf sal kry, hy word dus glad nie meer deel van die, kom ons noem dit die groep wat dus met ander finaal die ooreenkoms moet onderteken nie. Parketrust sal na hom omsien, en dit is die besluit wat ons geneem het en dit is ook so aan mnr Pauw oorgedra.
>
> Die erf wat hy gekry het was een van die erwe wat die trust besit het? --- Dis een van daardie ag erwe en die besluit op daai stadium was dat dit sal aan hom oorgedra word op 'n basis dat hy afstand doen van alle regte sodat ons dit aan die gemeenskap kan oordra, sodat hulle kan voortgaan om hierdie te kan – die ooreenkoms te kan sluit. Ons het op 'n bedrag van R25 000.00 besluit, wat 'n duimsuig in terme van prys was en dit was eintlik net om ons kostes en die oordragkostes, ek wil net vir u meld dat die trust het byvoorbeeld elke keer betaal vir die omgewingimpakstudies, die trust het vir 'n verskeidenheid van die goed betaal ten einde hierdie transaksie gefinaliseer te kry.

In answer to a question as to what happened to other erven which belonged to the Parks Trust, Stroebel said that two of them were sold to resolve issues similar to those in the case of the first respondent, and added that –

> ….. die ander erwe is nog steeds in ons besit en ons is bewus daarvan – wel ons het aanbiedings op die oomblik van R2 miljoen vir ‘n erf.

In regard to Griessel’s attitude, the following passage in Stroebel’s evidence is of importance:

> Was sy bereid – was me Griessel bereid om die dokumentasie te teken vir die afhandeling van die oordragte voordat u hierdie kontrak gesluit het met mnr Pauw? --- Nee sy het eers nadat ek haar ingelig het dat ons nou ‘n ooreenkoms gerkry het dat hy ‘n erf sal kry as een van die Parketrust erwe, het sy ingestem daartoe om die ooreenkoms te sluit.
>
> Is sy meegedeel dat – van die afstanddoening van regte? --- Ja absoluut, ek meen dit was gemene saak onder die persone dat die rede hoekom mnr Pauw ‘n erf gaan kry is omdat hy aanspraak maak op regte. Ons het geweet die gemeenskap en onder andere sy, het daai regte ontken, maar om die problem weg te neem het ons gesê ons sal vir hom ‘n erf gee en dan moet hy afstand doen van al sy regte en dis op grond daarvan wat – twee goed, wat – sy het eintlik geteken, maar dis ook die enigste rede hoekom ons aan mnr Pauw ‘n erf gegee het. Ek meen daar was geen ander rede hoekom ons aan Pauw ‘n erf sou gee nie.

Stroebel was adamant that the waiver had taken place in 1991 prior to the signing of the Agreement. When it was put to him in cross-examination that “in 1992 was daar nog geen afstanddoening van regte deur mnr Pauw gewees”, he intervened –

> O nee, nee, daar was sonder twyfel absoluut deur mnr – ekskuus tog, op grond waarvan sou ons andersins vir mnr Pauw ‘n erf gegee het?
>
> …..
>
> Ek wil vir u sê die afstanddoening is wat my betref in 1991 voltooi gewees gegrond op ‘n belofte, ons gaan vir jou ‘n erf gee, so jy gaan daar kan aanbly, jy doen afstand van alle regte …

[44] The sale of the erf to the first respondent was formalised in a Deed of Sale (“the Deed of Sale”) entered into in 2001 after the subdivisions had been made. In the Preamble of the Deed of Sale, entered into between the Parks Trust as seller and the first respondent as purchaser, the history of the negotiations with the owners of Stofbergsfontein with a view to the purchase of the farm by the Parks Trust is briefly set out. For present purposes it is necessary to set out the terms of paragraphs 1.2, 1.8 and 1.10 of the Preamble:

> Dit word geboekstaaf dat:
>
> 1.2 Gedurende die aanvanklike onderhandelinge met die eienaars het dit geblyk dat sekere persone wat nie geregistreerde eienaars van die plaas was nie, sekere “verblyfregte” en “aansprake” met die verloop van die jare op die plaaas Stofbergsfontein gevestig en bekom het wat daartoe gelei het dat Nasionale Parkeraad en Nasionale Parketrust wat die aankoop van die plaas sou finansier, met gemelde persone moes onderhandel en ooreenkomste sluit vir die aankoop van die plaas. Daardeur is die regte en aansprake van sekere “nie eienaars” noodwendig erken.
>
> 1.8 Uit die korrespondensie sedert 1991 en konsepooreenkomste hierby aangeheg onderskeidelik gemerk “C1-C5”gewissel tussen die koper en die Nasionale Parkeraad dit ooreengekom was dat die koper ‘n erf

(destyds Nr 55 en later Nr 50) sou bekom teen R25 000.00 in ruil waarvoor hy van sekere "aansprake" sou afstand doen.

1.10 Die Verkoper en die Koper gedurende 1999/2000 ooreengekom het dat die koper oordrag kan neem van Gedeelte/Erf Nr 60 ter uitvoering van die gemelde "ooreenkomste" waarna verwys word in 1.8. hierbo deurdat die Verkoper een van die eiendomme aan hom toegeken (sien Klousule 1.6 hierbo) naamlik Gedeelte 60 (voorheen Erf Nr 59) aan die Koper sal oordra teen betaling van die bedrag van R25 000.00 asof die eiendom formeel aan die koper verkoop is op 24 Junie 1991 vir gemelde bedrag.

[45] The waiver of rights by the first respondent was, therefore, negotiated by Stroebel in his role as facilitator or intermediary ("tussenganger"). The waiver was necessary in view of the refusal of Griessel and other shareholders to sign the Agreement if the problems created by the first respondent's claim of rights were not resolved. Stroebel communicated the waiver to Dr Robinson of the Parks Board and to the shareholders, including Griessel. The Agreement was signed and ownership of Die Stroois was allocated to Griessel.

[46] The waiver is recorded in paragraph 1.8 of the Preamble to the Deed of Sale as an agreement that <u>had been</u> entered into between the Parks Board and the first respondent ("tussen die koper en die Nasionale Parkeraad dit ooreengekom <u>was</u>" (my emphasis)) in exchange of which he would receive a certain erf. In paragraph 1.10 of the Preamble it is recorded that the Deed of Sale gives effect to the agreements entered into in relation to the waiver of rights and the receipt of an erf in exchange. As part of the developments that preceded and gave rise to the waiver, paragraph 1.8 of the Preamble refers to certain correspondence and

certain draft agreements ("korrespondensie sedert 1991 en konsepooreenkomste hierby aangeheg onderskeidelik gemerk 'C1-C5'"). It should perhaps be stressed that paragraph 1.8 of the Preamble does not constitute the waiver – it records the waiver of rights by the first respondent prior to the signing of the Agreement on 24th December 1991.

[47] The respondents contend that the waiver was part of a composite agreement which embraced the first respondent's waiver of his rights, the making available to the first respondent of an erf by the Parks Trust, and the purchase of Die Stroois by the second respondent.

[48] Stroebel more than once emphasised in evidence that during his negotiations with the first respondent for a waiver of the latter's rights in exchange for an erf to be made available by the Parks Trust, the first respondent at no stage indicated to him that his sister also had claims. To cite but one of his repeated assertions, he said in evidence in chief:

> Het hy vir u aangedui op daardie stadium dat sy suster ook aansprake het? ---Nooit. Ek het sy suster vanoggend vir die heel eerste maal ontmoet en sy was nooit ter sprake asof sy aansprake het nie.

It was put to Stroebel in cross-examination that the second respondent, through her attorneys, was dealing directly with the Parks Board in regard to her claims. Stroebel could not, and did not, deny this.

[49] The negotiations on behalf of the second respondent for the purchase of Die Stroois at a price of R180 000.00 are apparent from the correspondence contained in the Bundle. The proposed purchase also features in the letter dated 24th June 1991 addressed to the Parks Board in

which it is stated that both the respondents waive whatever rights they may have to Stofbergsfontein, subject to (i) the erf being transferred to the first respondent at a purchase price of R25 000.00, and (ii) the simultaneous transfer by Griessel of Die Stroois to the second respondent at a price of R180 000.00. In a further letter (dated 8th February 1996) addressed to the Parks Board by the respondents' attorney, it is said that the second respondent –

> Onder aparte dekking met u sal korrespondeer insover dit nodig mag wees ten einde haar transaksie te finaliseer met Mev Lorainne Griessel vir die transportering van "Die Stroois" vir R180 000.00.

The two letters are annexed to prargraph 1.8 of the Preamble to the Deed of Sale in which the background (history) of the first respondent's waiver of his rights in exchange for an erf as negotiated with Stroebel is set out.

[50] It is common cause that the sale of Die Stroois to the second respondent for R180 000.00 was never reduced to writing and signed by the parties. The second respondent, moreover, did not assert any claim to Die Stroois when it was allocated to Griessel in the Agreement and in the Supplementary Agreement, nor when the property was transferred to Griessel in 2002.

[51] In my view, there was no composite agreement. The evidence of Stroebel establishes that the first respondent in 1991 waived his rights to Die Stroois in exchange for an erf to be transferred to him for a relatively nominal price of R25 000.00. The proposed sale of Die Stroois was the subject of a different agreement between different parties; it did not come off the ground, and in the end no agreement was concluded.

Right of occupation.

[52] The first respondent's claim to a right to occupy Die Stroois arises from the terms of the Supplementary Agreement entered into between the Parks Board, the Parks Trust and the shareholders on 31st January 1992; that is, a little more than a month after the Agreement was signed. The Supplementary Agreement relates, *inter alia*, to the allocation of the four the "farmhouses" which are identified as follows in clause 3.1:

> No 2 Occupied by Mr Caswell
> No 13 Occupied by Mr Johnson
> No 14 Occupied by Mr De Nicker
> No 8 Occupied by Mr Pauw

In clause 3.2 it is noted –

> … that the farm houses referred to above have been allocated to Lorraine Myrtle Griessel in terms of the Agreement for her sole benefit and title subject to the following conditions.
>
> 3.2.1 Payment
>
> (a) Payment of R7812.50 (seven thousand eight hundred and twelve Rand and fifty cents) each by Lorraine Myrtle Griessel to Mrs JW Florentino and to Mr MJ Slabbert in full and final settlement of their respective share entitlement in these farm houses which payment is to be made on fulfilment of the suspensive conditions of the Agreement.
>
> 3.2.2 Occupation and usage rights

> Lorraine Myrtle Griessel and her successor in title accepts and agrees that:
>
> (a) the existing occupiers have usage and occupation rights of the respective farm houses
>
> (b) existing occupiers may have incurred costs in the purchase and acquisition, repairs and improvements to their respective farm houses that they occupy.
>
> (c) The A and B-Group members are indemnified against <u>any</u> claims by the occupiers of the farm houses in respect of
>
> (i) their occupation rights
> (ii) compensation for costs in respect the acquisition, purchase, repairs or improvements to the farm houses that they occupy
> (iii) restoration of rights
> (iv) any other claims.

[53] In the Agreement the farmhouses were allocated to Griessel. From the terms of the Supplementary Agreement it is apparent that the other shareholders were concerned about their incurring liability for claims by occupiers of the farmhouses. The purpose of clause 3 of the Supplementary Agreement is clearly to re-iterate the allocation of the farmhouses to Griessel, who will recognise the usage and occupation rights of occupiers of the farmhouses and who will indemnify the other shareholders (the A and B-Group members) against claims by the occupiers. I do not agree with the submission made in argument that the shareholders agreed to the transfer of ownership of the farmhouses to Griessel on the basis that she would respect the occupiers' right of

occupation and not seek their eviction – the essential purpose of clause 3 of the Supplementary Agreement was to ensure that the other shareholders did not incur liability in respect of claims for compensation by the occupiers of the farmhouses allocated to Griessel. That the parties were very much aware of the possibility of claims for compensation is apparent from the memorandum, dated 18th January 1991, prepared by Griessel's husband and addressed to the respondents' attorney in which he states that he had discussed the question of "vergoeding vir verbeterings" with the first respondent. The nature and extent of the usage and occupation rights of the different occupiers of the farmhouses are not spelled out in the Supplementary Agreement: the legal base of the usage and occupation rights may have been different in the individual cases.

[54] The Agreement and Supplementary Agreement came to the notice of the first respondent in February 1992. The respondents' attitude to the agreement is set out as follows in the first respondent's answering affidavit:

> We have not accepted the benefits which were intended by those provisions to be conferred upon us. The reason we have not done so, is because we assert title as owners to Die Stroois, and it would in the circumstances not make sense for us to assert a lesser, contractual right. In the event, however, that this Honourable Court should find that we are not entitled to assert rights as owners of Die Stroois, we shall certainly accept the benefits of the Parks Board agreement pertaining to ourselves as protected occupiers with usage and occupation rights. Such rights, I respectfully say, would disentitle Applicant from the relief she seeks in these proceedings.

[55] The first respondent, therefore, relies upon a conditional acceptance (by way of his answering affidavit and at the end of his

evidence in chief) of the right to occupy the property, conditional upon a finding that he does not enjoy prescriptive title. In his evidence, the first respondent re-iterated that they would reluctantly accept occupation as an alternative if their claim to prescriptive title should be unsuccessful.

[56] In my view, the first respondent has made it clear that when the Supplementary Agreement came to their attention during February 1992, they unequivocally elected not to accept the benefit of the right of occupation. Election, as Trollip JA pointed out in *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 698G, generally involves a waiver:

> … one right is waived by choosing to exercise another right which is inconsistent with the former.

[57] It was further submitted that Griessel had contractually restricted her ownership by way of the Supplementary Agreement and what she received was ownership less the (immediate) right to use and occupy the property. Mr Fagan suggested that conceptually the position is no different from the sale of immovable property by a landlord where the right of occupation of a lessee is protected by the *huur gaat voor koop* principle. The answer is twofold. Firstly, by their election not accept the benefit of the right of occupation, any contractual restriction on Griessel's ownership was still-born; what remained was her obligation to indemnify the other shareholders against the claims of occupiers. Secondly, *huur gaat voor koop* vests a real right in the lessee. Zimmermann *The Law of Obligations* 382 points out that –

> … from a dogmatic point of view this presents something of an anomaly: for the tenant, on the basis of a conceptually obligatory contract of lease, acquires quasi-real position, a 'modified or exceptional' real right.

I am not disposed to extend an anomalous rule which finds its origin in Germanic and old Dutch customary and statutory rules.

The second respondent's position

[58] It was pointed out above in paragraph [41] that the question whether or not the second respondent possessed openly as if she were the owner arises only if it is accepted that the period of acquisitive prescription commenced with Mr Callie Pauw at the end of 1973 / beginning of 1974.

[59] In regard to the requirement in section 1 of the Prescription Act 68 of 1969 that a claimant must have possessed openly, DL Carey Miller (with Anne Pope) *Land Title in South Africa* (2000) at 164 say:

> There are two reasons why possession must be open rather than secret or clandestine. First, in that prescription is justified by the impression created by outward appearances, in the world at large, it stands to reason that the exercise of rights must be patent: without this the element of publicity could be satisfied. Secondly, from the owner's point of view, the security of ownership entitles an owner to leave his or her property and it would be unfair to expect him or her to take steps to recover possession maintained secretly by another.

[60] It was submitted on behalf of the applicant that during the period 1984 to 1990 there is documentary proof that the first respondent asserted his rights to, *inter alia*, Die Stroois, but that there is none of the second

respondent doing likewise. On the other hand, it is beyond dispute that after Mr Callie Pauw's death, the second respondent, along with the first respondent, took possession and occupation of Die Stroois which they used as a holiday cottage. The second respondent, her husband and her children regularly spent week-ends and holidays in the cottage. The wedding reception of one of the second respondent's daughters was held on the property. She contributed her share to the maintenance of the cottage.

[61] The first respondent was undeniably looked upon as the "principal" occupant of Die Stroois. This is perhaps inevitable if one keeps in mind that Die Stroois had since 1974, when Mr Callie Pauw took occupation, been occupied by a member of the Pauw family. Thus, for example, in the Supplementary Agreement, the occupier of Die Stroois is given as "Mr Pauw"; there is no mention of Mrs Kruger. In the correspondence there is reference to the claims of "Pauw" and the "Pauw Familie Aansprake", the latter term clearly used in a context which includes the second respondent. In an undated letter apparently written shortly after 11th September 1990 addressed to Dr Robinson of the Parks Board, Griessel refers to a meeting which her husband had with Dr Robinson at which her husband had expressed some optimism that a settlement could be reached with Charl Pauw in connection with Die Stroois. She further refers to "a proposition" which her husband had shortly after 11th September 1990 put to the respondents' attorney. This is clearly a reference the proposed sale of Die Stroois to the second respondent once Griessel had obtained title to the property. In the rest of the letter, Griessel deals with the claims of Pauw to Die Stroois, and makes it clear that she finds his claims wholly unacceptable.

[62] The applicant contends that the second respondent merely occupied through the first respondent as a member of the family. In my view, "the impression created by outward appearances" is such that the second respondent's possession of Die Stroois meets the test that she possessed openly.

[63] The question arises, however, whether the second respondent possessed the property as if she were the owner thereof ? Can a claimant for prescriptive title possess "as owner" if he or she indicates a willingness to negotiate with the owner for the purchase of the property concerned? In *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) Miller J (as he then was) states (at 680B):

> As I understand the authorities, property may be possessed 'adversely to the rights of the true owner' if it is held and possessed by one who, knowing that he is not the legal owner, nevertheless holds it as if he were; ie without manifesting recognition of the true owner's rights as such.

(The learned Judge refers to following authorities: *Malan v Nabygelegen Estates* 1946 AD 562 at 574; *Du Toit and Others v Furstenburg and Others* 1957 (1) SA 501 (O) at 505; *Payn v Estate Rennie and Another* 1960 (4) SA 261 (N) at 262) (See further DL Carey Miller (with Anne Pope) *Land Title in South Africa* (2000) at 174—176).

[64] The case of *Du Toit and Others v Furstenburg and Others, supra,* is instructive within the present context. In that case, the claimant let the property, made permanent improvements thereon and generally acted as though he was the owner. De Villiers J (as he then was) rejected the argument that an attempt to obtain transfer by the claimant was an act

inconsistent with the intention to possess "as owner". At 505G—H the learned Judge states:

> Now would the possession cease to be adverse merely because he asks for transfer from a person who is prepared to give transfer and who makes no claim to the property itself ? I do not think so. It seems to me that possession which is adverse only ceases to be adverse where the true owner makes claim to the property, ie asserts his rights as owner, and the person exercising possession acknowledges that other as the true owner.

Griessel asserted her ownership and the second respondent acknowledged Griessel as the true owner by negotiating with her the purchase and transfer of the property. This is further acknowledged in the letter dated 8th February 1996 addressed to the Parks Board by the respondents' attorney, in which reference is made to the finalisation of the transaction with Griessel for the transfer of Die Stroois to the second respondent for a purchase price of R180 000.00 (the relevant paragraph in the letter is cited in paragraph [49] above). The second respondent's possession ceased to be adverse when she acknowledged Griessel's rights as owner.

The Subdivision of Agricultural Land Act 70 of 1970

[65] Section 3 of the Subdivision of Agricultural Land Act 70 of 1970 ("the Act") places a prohibition upon the subdivision of agricultural land without the consent of the Minister concerned. It is common cause that the property in question was, at least during the 1970's and 1980's agricultural land within the meaning of the Act.

[66] The applicant contends that whilst the farm Stofbergsfontein and therefore the property was agricultural land, no occupier of any portion of

the farm could acquire that portion by way of prescription. Prescription could therefore not run in favour of the occupier and against the owners of the property for as long as it was agricultural land.

[67] In view of my finding that the respondents have not established their claim to prescriptive title, the issue raised by the applicant need not be decided. Suffice to say that, in my view, the submission on behalf of the respondents is correct; namely, that the Act does not prevent a person from acquiring agricultural land by way of acquisitive prescription, but in order to subdivide agricultural land so as to give effect to prescriptive title in respect of a portion of such land, ministerial consent in terms of section 3 of the Act would be required.

Co-possessors

[68] As is pointed out above in paragraph [41], if it were to be accepted that the period of acquisitive prescription commences with Mr Callie Pauw at the end of 1973 / beginning of 1974, the first respondent falls short of the requisite 30 year period but the second respondent would have established her 30 years. It is the applicant's contention that failure by one possessor successfully to assert ownership of property by acquisitive prescription has the result that the assertion of co-ownership by another possessor also fails.

[69] The respondents say that the fact that the applicants have asserted joint ownership of Die Stroois is of no concern to the applicant whose only concern is whether any possessor can successfully assert acquisitive prescription against her. If any possessor is able to do so, that terminates the applicant's ownership of the property.

[70] The respondents rely on *Barker NO v Chadwick and Others* 1974 (1) SA 546 (D), a case in which four brothers possessed immovable property in undivided shares. Three of the brothers died before the lapse of the period required to establish prescriptive title. The estate of the fourth brother claimed ownership by prescription of the immovable property. It was held by Milne J (as he then was) (at 465F):

> The position is, therefore, that as against the owner of the property Dhumraj himself had the requisite possession of the property from 1906 to 1945. The fact that he shared that possession with two of his brothers until 1918 and with the one remaining brother until 1929, appears to me to be irrelevant in the particular circumstances of this case.

[71] The applicant submits that Milne J focussed on the physical (*corpus*) element of possession without specific regard to the mental (*animus*) element of possession. It is accordingly contended that the finding that the falling away of a co-possessor, who had the intention to possess the property as co-owner, cannot have any effect on the position of the remaining possessor, is wrong and should not be followed. The applicant says that in the present case the respondents had throughout occupied the property as co-owners and that neither of them ever occupied the property as sole "owner". It is further contended that even after the first respondent had fallen away (either by reason of his waiver or interruption of his prescriptive period) the second respondent continued to occupy the property, not as owner of the property as a whole, but as co-owner of half of the property in undivided shares. In the circumstances she has, to this day, recognised the first respondent's claim to ownership and though she may have been in possession of the property

for the requisite period, her *animus* has always been one of co-owner only.

[72] In my view, if the second respondent's shared occupation is sufficient in degree to support the conclusion that she acted as if she were the owner, the fact that she intended to share ownership with a co-occupier is of no concern to the applicant. The failure of the first respondent successfully to assert ownership of the property by acquisitive prescription does not, therefore, have the result that the assertion of ownership by the second respondent must fail on this score.

Conclusion

[73] In view of the foregoing, I have come to the conclusion that the first and second respondents have not established their claim for ownership of Die Stroois by acquisitive prescription. The first respondent has also not established his claim to a right of occupation of Die Stroois.

[74] The following orders are made:

1. The respondents are ordered to vacate the property known as "Die Stroois" being Portion 6 (a Portion of Portion 2) of the farm Stofbergsfontein No 365, in the West Coast District Municipality, Division Malmesbury, Province of Western Cape within three months of the date of this order, failing which the Sheriff for the district of Morreesburg/Hopefield is authorised to remove them and all persons under their control, together with their possessions, from the said property on 30th October 2006.

2. The first and second respondents must pay the applicant's costs of suit jointly and severally, such costs to include the costs reserved by paragraph 7 of the order made on 29th August 2005 and paragraph 5 of the order made on 24th November 2005, and the costs occasioned by the employment of two counsel.

HJ ERASMUS, R