IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: 14722/10

In the matter between:

CHARLES BERNARD SUMMERS	**First Applicant**
KATRINA SUMMERS	**Second Applicant**
and	
JOHNIE BOY KIEWITZ	**First Respondent**
JOHANNA KIEWITZ	**Second Respondent**

JUDGMENT DELIVERED: THURSDAY 01 SEPTEMBER 2011

SALDANHA, J

[1.] This is an application in terms of the Prevention of Illegal Eviction From And Unlawful Occupation of Land Act 19 of 1998 (PIE) for the eviction of the respondents from the immovable property, Erf 74, Hawston, Overstrand Municipality, Western Cape, which is situated at, and commonly known as, 19 Church Street, Hawston, Western Cape.

[2.] The respondents opposed the relief principally on the ground that they had become the owners of the property by virtue of acquisitive prescription.

The issues in dispute.

[3.] The respondents claim that the applicant had failed to meet three of the requirements of PIE namely;

(i) that the applicants had failed to prove that they were the owners of the property,

(ii) that they had failed to prove that the respondents were in unlawful occupation, and

(iii) that they had failed to prove that it would be just and equitable to evict the respondents.

[4.] It was not in dispute that the applicants had complied with the formal requirements of section 4(2) as read together with section 4(5) of the PIE Act.

[5.] The applicants contended in response to the claim of acquisitive prescription that on the respondents' own version they had not possessed the property openly and for an uninterrupted period of thirty years and with the necessary intention of acquiring the property within the prescripts of the requirements of acquisitive prescription.

[6.] The respondents also contended that the applicants had erroneously chosen to institute the proceedings by way of motion proceedings in circumstances where there were serious disputes of fact with regard to the circumstances in which the respondents had come to be in possession of the property, the basis on which they occupied the premises, and the duration of the occupation. It was contended that the respective versions of the parties were irreconcilable and could not be resolved on the basis of affidavits. In this regard the respondents claimed that the applicants ought to have anticipated the

disputes of fact and should have instituted proceedings by way of action based on the *rei vindicatio* and in accordance with the provisions of the PIE Act.

The applicants' version.

[7.] (i) The applicants, who were originally from Hawston, obtained the property in 1978 by way of a donation from the first applicant's late father. On the 27 April 1981 the property was registered in the name of the first applicant as evidenced by the Title Deed to the property.

(ii) When the first applicant's father moved from Hawston to Cape Town in or about 1980 the property was left vacant with the risk of it being vandalized and/or burgled. The first applicant claimed that on behalf of his father he requested the respondents to *"take care of the property,"* which offer they accepted. The applicants claimed that during 1980-1985 the respondents relocated to Johannesburg and upon their return to Cape Town they needed a place to stay and the parties then agreed that the respondents would *"look after the property"* and would pay the rates and taxes. The applicants also claimed that they *"would require vacant possession of the property on notice"*. In terms of the agreement the respondents occupied the property with the applicants express knowledge and consent. The applicants' also claimed that they returned to Hawston on holiday from time to time and used the property.

(iii) On account of having recently retired, first applicant decided to sell the property as he claimed he did not foresee him or his family relocating to Hawston or continuing to utilize the property as a holiday home.

(iv) On the 7th May 2009 the applicants by letter gave notice to the respondents to vacate the property within one month failing which legal steps would be taken against them. The applicants claimed that instead of availing themselves of the opportunity to regularize their occupation and/or to seek alternative accommodation the respondents responded to the notice to vacate through their attorneys. The first applicant, however, contended that the contents of the letters from their respective attorneys were not relevant for the purposes of the relief sought and would only deal with such contents *"if required to"* in a replying affidavit. The applicants claimed that since June 2009 the respondents were in unlawful occupation of their property and had also done so without paying any rental. The applicant contended that the respondents had alternative accommodation on an adjacent property which they claimed belonged to the first respondent's mother. The applicants further claimed that the respondents' refusal to vacate the property was not as a result of necessity but rather as *"a transparent attempt to take ownership of the property by stealth."*

[8.] The applicants further claimed that they had *"been advised that the respondents may argue that they have an option to purchase the property,"* which option they have *"constantly relied on"*. The applicants claim that the respondents have, however failed to conclude an agreement of sale at fair

market value, save for the payment of R5000,00 towards *"a purchase price of the property."*

[9.] The applicants on the 26th May 2010 sold the property for R300 000,00 (excluding VAT) to the Moravian Church of South Africa. The Moravian Church of South Africa was aware of the occupation by the respondent and the applicants were required to give vacant occupation to the Church by the 31st October 2010 failing which it could elect to cancel the Agreement of Sale.

The respondents' version

[10.] The first respondent is a 69 year old pensioner, while the second respondent is 60 years old. They claim their only source of income is the first respondent's old age pension.

[11.] The second respondent deposed to the opposing affidavit on their behalf and claimed that the first applicant was well known to her as they had grown up together in Hawston. Her parents and the applicants' parents were also old friends.

[12.] She claimed that shortly after the death of the first applicant's mother and while the first applicant's father had still lived in the premises together with another family member, the first applicant approached them and asked them if they were interested in buying the property. The first applicant had explained that his father was going to relocate to Cape Town and live with him and that he

did not foresee himself living in the house. He proposed a purchase price of R6000,00.

[13.] The second respondent claimed that at that stage they were permanently resident in Hawston and had no intention of leaving the area. Their second child had already been born and they needed a place to live. They therefore accepted the first applicant's offer to purchase the property for the amount of R6000,00.

[14.] The second respondent claimed that she has since been advised by her attorney that the oral agreement of purchase in respect of the land was not valid. She claimed though that she and the first respondent had no knowledge of legal matters and that when they entered into the oral agreement with the first applicant in 1978 they believed that the agreement was valid and enforceable. She claimed that the first applicant was very good to her and they had their full trust in him and believed that he would keep to his word.

[15.] She could not recall the exact date on which they had taken possession but recalled that they had already occupied the property by1978, being the year before the first respondent obtained employment in Secunda. She further claimed that they were under financial strain and because work had been scarce the first respondent was forced to obtain employment in Secunda. She did not join him in Secunda but remained in the house together with their two children. She claimed that one of the most important reasons why the first respondent took

the work in Secunda was to enable them to pay off the purchase price to the first applicant.

[16.] At the end of 1979 when the first respondent obtained his first annual bonus he was in a position to begin with the payment of the purchase price and by the end of 1995 had already paid R5000,00 towards the purchase price of R6000,00. All the payments were made in cash to the first applicant and were made in various instalments of different amounts.

[17.] She claimed that upon their occupation they proceeded to pay the monthly rates and municipal charges in respect of the property although the accounts were in the name of the first applicant. They attached to their papers a rates receipt for the 20th April 1978 which had been issued by the then Caledon Divisional Council.

[18.] On the 18th December 1985 the applicants provided them with written proof that the amount of R5000,00 had been paid. It was written in the first applicant's own handwriting and signed by both applicants as well as both the respondents. The contents read as follows:

"Mr C. Summers

18 Welkom St

Portlands

Mitchells Plain

Ek die bogenoemde wil hiermee bevestig dat ek in besit is van R5000,00 as voorskot op betaling vir verkoop van huis in Hawston. Die oordrag van papiere sal geskiet wanneer ons die prokureur gaan sien."

[19.] The respondents claimed that during 1986 they had paid the outstanding amount of R1000,00 in settlement of the full purchase price. After they had paid the purchase price they attempted at various occasions to contact the first applicant to enable the transfer of the property into their names. They however got the impression that the first applicant had purposefully avoided them and on two occasions when they had specifically arranged to meet with him he failed to keep the appointments. In one instance they went to his house without an appointment and were told by a neighbour that he had jumped over a fence in an +attempt at avoiding them.

[20.] The second respondent claimed that from 1978 to 1989 she and the children had lived on the premises together with other family members. The first respondent came home during vacations from Secunda. In 1990 she obtained a post with the South African Bureau of Standards in Pretoria where she lived together with the first respondent who had then worked for a construction company in Johannesburg. Their oldest daughter who had completed matric remained in the house in Hawston. Their younger son had accompanied them to Pretoria. Her sister, her sister's husband, and their children lived in the property while her daughter enrolled as a student at the University of the Western Cape and regularly spent weekends and vacations at the property. In 1992 her sister

and her sister's husband moved into their own home and second respondent's brother and his partner at the respondents' request lived in the house. At the end of 1992 her daughter had completed her studies and returned to Hawston where she lived in the house. The second respondent claimed that while she and her husband had lived in Pretoria from 1990 to 2001 they retained possession of the house and that their furniture and possessions remained in the house. They also returned to the house over various weekends and after her husband's retirement in December 2001 they returned to the property permanently.

[21.] During the Easter weekend of 2005 they claimed that the first applicant out of the blue visited them. This was the first time in approximately eighteen years that they had seen him and the first respondent raised with him the question of the registration of the property into their name. The first applicant undertook to discuss it further with them but never did so. On Good Friday in 2008 he again visited them where the question was again raised with him by the respondents. He again undertook to discuss it with them but never did so.

[22.] In February 2009 the first applicant visited them and for the first time claimed that he had kept the property as an investment and that they should make an offer to him for the purchase of the house. In response the first respondent showed him the document which they had signed (referred to above) to which the first applicant responded that it was just *"'n stukkie koerant papier"*

[23.] In April 2009 they received a notice from the Western Cape Housing Tribunal that the first applicant had laid a complaint against them for certain improvements which they had made to the house without his consent. In a handwritten complaint by the first applicant it is stated that the *respondents "had to pay yearly rates and water. Maintain property. Payed (sic) R6000 as deposite (sic) to Bay House (over six years). Staying in house while pay amount." It is also* stated *"No rent or any other was payed (sic) while staying in house while paying off amount"* and he stated *"(I as owner payed all stuff.)"* The second respondent claimed that when they appeared at the Tribunal it declined to deal with the matter as it claimed it had no jurisdiction.

[24.] In early May 2009 the respondents consulted with their attorneys, Guthrie and Theron, who on their instruction directed a letter to the first applicant. The letter recorded the history of the relationship between the applicants and themselves in respect of the purchase of the property. Since no written agreement had been entered into they proposed that an agreement be formally entered between the parties in respect of the purchase of the property. In the event of the applicants refusing to do so the respondents threatened to approach a court on the basis of acquisitive prescription in that they had possessed the property for thirty years. The applicants responded directly and refused to sign any contract of sale with the respondents. The respondents claimed on the 17th May 2009 the applicant approached them and demanded that they vacate the property in terms of a written notice.

[25.] On the 15th June 2009 the respondents received a letter from attorneys Marais Muller Yekiso on behalf of the applicants in which the following was stated;

(i) that the payment of R5000,00 made by the respondent was regarded as rental by the applicants,

(ii) that the applicants denied that the respondents had possessed the property for an uninterrupted period of thirty years,

(iii) that the first applicant regarded himself as the owner of the property and offered to sell the property to the respondents at a price to be determined upon obtaining a municipal valuation thereof,

(iv) that the applicants would regard the R5000,00 as a part payment of the purchase price, and

(v) that applicants regarded the municipal charges paid by the respondents since 1978 as rental.

[26.] On the 21st August 2009 the applicants' attorneys again wrote to the respondents in which they claimed that the applicant was still prepared to sell the property to the respondents and would propose a purchase price.

[27.] The respondents claim that the applicants were at all times aware of their claim of acquisitive prescription. A letter was also addressed by the respondents' attorneys to that of the applicants about persons who, on the apparent instructions of an estate agent, had visited the property in breach of the respondents' privacy. The respondents once again claimed that they were the

owners of the property by virtue of acquisitive prescription and sought an undertaking that the applicants would desist in their conduct of attempting to market and sell their property.

[28.] In the letter the respondents placed on record that they had never paid any rental for the property since their occupation in 1978 and that they had immediately took responsibility for the payment of all municipal charges and rates and had immediately begun with the improvements on the property. In this regard they procured a sewerage toilet in the house together with a bathroom, built internal walls, improved the kitchen, erected a vibacrete wall, had cupboards built and tiled the floors.

[29.] The respondents claimed they had uninterrupted possession of the property with the clear intention as the owners thereof since 1978.

Applicants' reply

[30.] The first applicant filed a replying affidavit which was prefaced by the following averments that; *"he stood by the averments contained in his founding affidavit save and to the extent that he expressly and by necessary implication abandoned such allegations".*

[31.] The version of the applicants that emerged from the replying affidavit may be summarized as follows:

(i) They conceded that the date of occupation as claimed by the respondent as 1978 may be correct.

(ii) They admitted that the verbal agreement of sale was entered into (a fact which they had not disclosed in their founding affidavit) but alleged that this was done only after the respondents took occupation which was initially to merely *"watch over and maintain the premises."*

[32.] Although the first applicant disputed that he received the final payment of R1000,00 during 1986 he was not able to deny outright that he in fact received the amount.

[33.] The first applicant further denied that the respondents had attempted to make any contact with him with regard to the transfer of the property into their names and specifically denied that he had not kept any appointments or that he evaded meeting with them by jumping over a garden wall.

[34.] The applicants claimed that it was clear from the respondents' own version that until they finished paying the purchase price they had possessed the premises on the basis of the oral agreement of sale and that they acknowledged that they would and could not become the owners of the premises pending payment in full of the purchase price and taking transfer of the property.

[35.] The applicants further claimed that on the respondents' version, neither of them resided in the property between 1990 to December 2001.

[36.] The first applicant further claimed that when he visited the respondent in February in 2009 he *had "remained of the view that I had no obligations in terms of the oral agreement of sale in the light of the fact that the full purchase price had not been paid to date thereof".* He therefore elected *"to terminate"* the agreement and advised the respondents of his election by indicating that he wished to sell the property.

[37.] With regard to the amount of R6000,00 referred to in his complaint to the Housing Tribunal he claimed that it was an error arising from his confusion about the total amount actually received in respect of the agreed purchase price.

[38.] The first applicant further disputed that the receipt produced by the respondents from the Caledon Divisional Council was proof of payment and claimed that it was merely an account. He however conceded that the respondents had assumed liability for the payments of the rates and services to the municipality upon their assuming occupation of the premises. The first applicant claimed that such payments could not be regarded as anything else but the payment of rental and subsequently as occupational rental pending transfer of the property to the respondents.

[39.] The applicants further admitted that the respondents had made the improvements to the property. They claimed though that as the respondents had not provided any dates as to when the renovations were made and the costs thereof any possible enrichment claim that the respondents may have against them had long since prescribed.

[40.] The first applicant also corrected his initial claim with regard to the contractual relationship with the respondents and in this regard claimed that the agreement that had been reached with the first and second respondent at the stage of their return to Cape Town was that they would look after the property and that in fact was what they had initially agreed to with the respondent. He claimed that his founding affidavit was not correct as his recollection of the events that had transpired almost twenty to thirty years ago was affected by his memory and which he had only *"properly refreshed when I considered the opposing affidavit"*. He claimed that there was confusion in his mind about how the events had transpired and that he had incorrectly instructed his attorneys when preparing the founding affidavit. For that he apologized to the court.

[41.] He further claimed that the allegations in his founding affidavit to the effect that he had *"been advised that the respondents may argue that they had an option to purchase the property"* and his claim that the respondents *"constantly rely on this alleged option as being false"* was not entirely correct. In this regard he offered the same explanation of poor memory and apologized for having misled the court.

[42.] The first applicant tendered to repay the amount of R5000,00 to the respondents. In conclusion he reiterated that he was the registered owner of the premises and that any claim by the respondents that they had acquired the premises by acquisitive prescription failed on the respondents' own version. Further, he claimed that the respondents had failed to place any, let alone sufficient facts and circumstances before the court that it would not be just and equitable to grant an order of ejectment.

Factual disputes

[43.] **Mr. Le Roux,** who appeared on behalf of the respondents, submitted that there were clearly a number of factual disputes before the court. The approach to be adopted by the court when faced with such disputes in motion proceedings are set out in the oft quoted case of **Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C)** at **235E – G**:

> *"..... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order.....Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."*

[44.] This formulation of the general law and particularly the second part thereof was both clarified and qualified by Corbett J in the decision of **Plascon Evans**

Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) wherein the following principles were set out at 634I-635B

> *"In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858(A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E – H)."*

[45.] These principles are applied in motion proceedings in general, see **National Union of Metal Workers of SA and others v Fry's Metals (Pty) Ltd 2005 (5) SA 433 (SCA) at 456A-B** and also the discussion by Davis J of the **Plascon Evans** rule in the matter of **Ripoll-Dausa v Middleton NO and others 2005 (3) SA 141 (C).**

Notwithstanding the apparent disputes of fact neither of the parties sought to apply for the matter to be referred to oral evidence. The parties were equally of the view that the court should determine the application on the papers before it.

[46.] **Mr Van der Merwe,** who appeared on behalf of the applicants, submitted that insofar as the respondents had admitted that the applicants were the registered title holders of the property and that such title was *prima facie* proof of the applicants' ownership, the *onus* rested on the respondents to prove on a balance of probability their claim of acquisitive prescription. In this regard he referred to the decision of **Davis AJA in Pillay *v* Krishna And Another 1946 (AD) at 946**

> *"Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it".*

Further in reference to **Voet** he states;

> *"He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute." This rule is likewise to be found in a number of places in the Corpus Juris I again give only one version: " Ei incumbit probatio qui dicit, non qui negat " (D. 22.3.2). The onus is on the person who alleges something and not on his opponent who merely denies it."*

The court made three further observations at 952-953 such as;

"The first is that, in my opinion, the only correct use of the word "onus" is that which I believe to be its true and original sense (cf. D. 31.22), namely, the duty which is cast on the particular litigant, in order to be successful of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to, combat a prima facie case made by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged. The third point is that the onus, in the sense in which I use the word, can never shift from the party upon whom it originally rested. It may have been completely discharged once and for all not by any evidence which he has led, but by some admission made by his opponent on the pleadings (or even during the course of the case), so that he can never be asked to do anything more in regard thereto; but the onus which then rests upon his opponent is not one which has been transferred to him: it is an entirely different onus, namely the onus of establishing any special defence which he may have".

[47.] Mr Van Der Merwe also referred to the decision of **Du Toit And Others v Furstenberg And Others 1957 (1) SA 501 (O)** with regard to the defence of prescription wherein De Villiers J at **page 503 para e-f**, stated;

"Dealing with the defence of prescription it is clear from the evidence that the disputed land is presently registered in the name of Ansie du Toit. That fact affords prima facie proof that she is the legal owner and the onus is consequently upon second defendant to prove that she acquired the disputed land by prescription and is accordingly the true owner. This onus she is entitled to discharge on a balance of probabilities but the Court will of necessity carefully scrutinise the evidence tendered before it will deprive Ansie du Toit of property registered in her name. (cf. Welgemoed v Coetzer and Another, 1946 T.P.D. 701 at p. 720.)"

[48.] On the basis of the respondents carrying the onus of proving the special defence of prescription, Mr Van Der Merwe submitted that the court was required to apply what he refer to as a "reverse approach" of the **Plascon Evans** rule. In this regard, in respect of the defence of acquisitive prescription the applicants were to be regarded as respondents and the respondents as the applicants. He submitted that the facts as stated by the applicants (the respondents in reverse), together with the admitted facts in respect of the respondents' (applicants in reverse) affidavits did not prove on a balance of probability the special defence of acquisitive prescription and that such defence should therefore be rejected. Mr Roux in response submitted the approach adopted by the applicants with regard to the application of the principles in **Plascon Evans** was misconstrued as the **Plascon Evans** rule dealt with the approach to be adopted by the court in motion proceedings in which final relief was sought as opposed to the incidence of *onus*. He contended against a reverse application of the **Plascon Evans** rule in the

determination as to whether the respondents had met the *onus*. Mr Le Roux submitted that the court must simply apply the principles laid down in the **Stellenvale** and **Plascon Evans** decision and that the court may only take into account the undisputed facts together with the facts alleged by the respondents. If these facts do not justify the order sought it must be refused. I will revert to this issue as it is inextricably linked to the dispute of fact that arose in the matter and the special defence raised by the respondents of acquisitive prescription.

The Claim of Acquisitive Prescription

[49.] The applicants submitted that the respondents on their own version did not possess the property openly as if they were the owners thereof for an uninterrupted period of thirty years.

[50.] Acquisitive prescription is governed in the main by the Prescription Act 68 of 1969, the old Prescription Act 18 of 1943 and where applicable the rules of the common law consistent therewith. Section 1 of Act 68 of 1969 provides as follows:

"1 Acquisition of ownership by prescription

Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years."

[51.] Section 2(1) of the old Prescription Act 18 of 1943 defines acquisitive prescription as;

"2 Acquisitive prescription

(1) Acquisitive prescription is the acquisition of ownership by the possession of another person's movable or immovable property or the use of a servitude in respect of immovable property, continuously for thirty years nec vi, nec clam, nec precario."

[52.] The provisions of the acts in respect of acquisitive prescription are very similar and our courts have held that the basis of acquisitive prescription, despite differences with regard to definition and concept, is the same. Watermeyer CJ, in **Malan v Nabygelegen Estates 1946 AD 562,** authoritatively held as follows (at 574);

> *"In order to avoid misunderstanding, it should be pointed out here that mere occupation of property "nec vi nec clam nec precario" for a period of 30 years does not necessarily vest in the occupier a prescriptive title to the ownership of that property. In order to create a prescriptive title, such occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as lease or usufruct which recognizes the ownership of another."*

See Saner "Prescription in south Africa Law" 1996 Edition

[53.] **Saner** further contends that the necessary requisites for acquisition of ownership by acquisitive prescription in the two Acts is not and does not purport to be exhaustive.

[54.] It is argued that in addition to the requirements of the Prescription Act the possession/occupation must be adverse or the true owner and not possession or occupation by virtue to some contract or legal relationship such as a lease to *precarium* which recognizes the ownership of another party. In this regard see the decision of **Cillie v Geldenhuys 2009 (2) SA 325 (AD) at page 331G-H** in which Harms (AJA) as he then was, considered the origins of the *"adverse user"* requisite.

"Dit sluit in dat die uitoefening nie met die herroepbare toestemming van Uitkomst geskied het nie,'n aspek waarop die weerleggingslas waarskynlik op Cillie gerus het maar wat in die lig van die aangehaalde getuienis nie ontstaan nie. (Vir die betekenis van nec precario waar 'n fontein ter sprake was, sien Malan v Nabygelegen Estates 1946 AD 562 en verder Bisschop v Stafford 1974 (3) SA 1 (A) 9D - H.) "

[55.] The elements of acquisitive prescription possession have been described as a combination of the physical control of (the *corpus;* the thing) by a person together with a controlling mental attitude *(animus*) towards the thing. It is therefore argued that for the purposes of acquisitive prescription, full juristic possession is required, namely, *"possessio civilis."* See in this regard the survey

of the origins of this requirement in Roman Dutch Law by Murray J in **Welgemoed v Coetzee and Others 1946 TPD 701 at pages 711-713** and the discussion by Watermeyer CJ in **Malan v Nabygelegen Estates** with regard to the requirement *"nec precario"* which concludes with the following comment at 573;

"It will be seen from these references (the pandects and the digests) that "nec precario" does not mean without permission or without consent in the wide sense accepted by the learned Judge but "not by virtue of a precarious consent or in other words not by virtue of irrevocable permission" or "not on sufferance" 573 of ***Malan v Nabygelegen Estates 1946 AD 562***

The requirement of *"nec precario"* is described by Coleman J in ***Morkels Transport v Melrose Foods and another 1972 (2) at page 476 G;***

"*Among the common law requirements, in addition to continuous, uninterrupted possession, nec vi, nec clam, nec precario , are these: the possession must be adverse to the rights of the true owner (see Malan v Nabygelegen Estates , 1946 AD 562 at p. 574); and it must be full juristic possession (possessio civilis), as opposed to mere detentio (see Welgemoed v Coetzer and Others , 1946 T.P.D. 701 at pp. 711 - 712). There must have been no acknowledgment by the possessor of the owner's title (Voet , 44.3.9)".*

[56.] Mr. Van Der Merwe submitted that in the light of the requirement of *nec precario,* if a person in possession of the property acknowledges the rights of the owner at any stage during the period of thirty years, the possession *ipso facto*

lapses as such person would have lacked the necessary *animus* from the time of recognition of the owners rights. He submitted that inasmuch as the test for acquisitive prescription as set in the 1969 Act was an objective one and that the elements of *animus domini* had to be determined in the light of the objective facts and circumstances of the matter, the requirement of *animus domini* is a mental state and therefore carries a subjective element. In that regard there was no better evidence than to look at the state of mind of the party claiming prescription. In this regard he argued that on the respondents' own version:

(i) they assumed occupation of the property in terms of the oral agreement of sale;

(ii) they paid the purchase price in instalments;

(iii) only once they paid the purchase price did they for the first time seek transfer of the property.

He therefore submitted that it was *"accordingly clear that the respondents had accepted that they had to pay the purchase price in full before they could lay any claim to the property"*. He concluded that the respondents had clearly envisaged that should they fail to do so they would not be able to take transfer of the property and the first applicant would be entitled to exercise his rights as true owner of the property. As such they had acknowledged the rights of the first applicant to the property at least until 1986 when they paid the purchase price in full. He therefore submitted that at least until 1986 the respondents lacked the requisite *animu domini* and as such the requisite *possessio civilis* to successfully claim acquisitive prescription.

[57.] Mr. Le Roux submitted to the contrary that it was clear from the context and the objective facts that the parties were unaware of the formalities surrounding the sale and transfer of immovable property. The agreement of sale was invalid from its inception for want of compliance with section 2 of the Alienation of Land Act 68 of 1981. The applicant at anytime before the completion of prescription could have taken the view that the agreement was invalid but had not done so. Mr. Le Roux submitted, and correctly so in my opinion that the relationship between the parties existed by virtue of a void contract and could therefore in law not be revoked. The respondents claimed that they were under the impression and believed they were the owners of the property from the time they were given the possession in 1978. Mr. Le Roux claimed that the *animus domini* of the respondents was clearly evidenced by the fact that they took possession of the property to the exclusion of others during 1978, as that they had not paid any occupational interest and neither had the applicants ever asked for occupational interest, and further, the respondent had taken responsibility for all the municipal charges and effected improvements as if they were the owners of the property thereof. He correctly in my view submitted that there was nothing to suggest that there was an understanding that the applicants could *"take the property back if the respondents had failed to pay the purchase price."*

[58.] There was some debate between the respective counsel as to exactly what was meant by the parties in the receipt of the 18th December 1985 in which reference was made to *"oordrag van papiere"* as opposed to transfer of

ownership. Mr. Le Roux submitted there was no evidence to suggest that the respondents understood that they would only become owners upon registration of transfer. Mr. Van Der Merwe contended to the contrary. If anything, in my opinion the interpretation to be given to the receipt which had been drafted by the applicants and signed by the respondents must be considered on the basis that it was drafted and agreed to by lay people and is the subject of conflicting interpretation between them. Given such conflict of interpretation and the apparent lack of understanding it is not an issue that can be resolved on the papers. What is significant though is the consistent conduct of the respondents in respect of their understanding that they had become owners of the property after the conclusion of the oral contract in 1978 (and which is also the subject of dispute). The disputes of fact in the context of the prescription defence go to the heart of the matter. Mr. Le Roux submitted that the court could not be satisfied with the inherent credibility of the factual averments made by the first applicant, save where they were admitted by the respondents, on the basis of his demonstrative lack of credibility, as displayed in the two affidavits that he had deposed to. Mr van der Merwe conceded that the first applicant *"had not covered himself in glory"* in respect of his credibility but submitted that it did not detract from the *onus* carried by the respondents in proving their claim of prescription on the version presented to the court. He also submitted that the court is required to subject the version proffered by the respondents to close scrutiny and in this regard relied on the decision of Murray J in **Welgemoed v Coetzee** (referred to already at) page 720.

"Even if it be conceded that no special onus is placed by law upon the claimant in an acquisitive prescription suit, the authorities lay down that the evidence of adverse user claimed to be such as to deprive a man of portion of his property, must be clear and is closely scrutinized."

[59.] Counsel for the applicants argued that the court should draw an inference from what the respondents state in their affidavit that they had not believed that they were the owners of the property and only sought the transfer after they had paid the purchase price. Such an inference, however, would fly in the face of the actual contentions by the respondents, namely, that they had at all times regarded themselves as the owners openly from the moment of them taking occupation of the property, that they had assumed responsibility for the rates and municipal charges, and that they had attended to extensive improvements, and in circumstances where they were not required to pay any occupational interest or rental to the applicants.

[60.] It is necessary to at this stage to revert to the competing contentions by the parties with regard to the approach to be adopted by the court in the application of the **Plascon Evan** principle. In the light of the applicant's contentions regarding the reverse of the application of **Plascon Evans** and having raised disputes of fact with regard to the claim of acquisitive prescription, they did not request that the matter be referred to oral evidence. In the light of the first applicant's own admitted change of versions, which impacts on his credibility, questions arise as to whether such disputes of fact raised by the

applicants regarding the claim of acquisitive prescription are in fact *bona fide*. Mr. Le Roux argued that the court was not required, nor asked, by the respondents to determine that they had become owners by way of acquisitive prescription in these proceedings. He submitted that to the extent that the applicants ought to have set out a truthful version in their founding papers about the respondents claims of acquisitive prescription they ought not to have brought these proceedings by way of application, but rather by way of action. I am in agreement with Mr. Le Roux's contention on this issue.

[61.] On the other hand, on the application of the principles of **Plascon Evans** as contended for by Mr. Le Roux, the respondents have raised *bona fide* disputes of fact with regard to the applicants' claim of ownership of the property. On the application of the principles in **Plascon Evans** as contended for on either of the parties' versions, and in the light of the disputes of fact which ought to have been anticipated, I am unable to make a finding in favour of the applicants.

[62.] Mr. Van Der Merwe submitted that if the court dismissed the application it would in fact amount to an expropriation of the applicants' property in favour of the respondents. That contention is without merit and is also based on a misconception of the notion of expropriation. The word 'expropriate' was dealt with by the Constitutional Court in **Harksen V Lane No And Others 1998 (1) SA 300 (CC)**

> *"[32] The word 'expropriate' is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation"*

A dismissal of the applicants claim for eviction does certainly does not amount to an act of expropriation by the court. Neither does this court make a finding in favour of the respondents on the question of acquisitive prescription.

[63.] Mr. Le Roux further submitted in argument that the court was able *mero motu* to deal with the issue as to whether it was just and equitable to order an eviction in the light of the improvement claim that the respondents may have on the property. The improvements were set out in the applicants' own papers, however, the respondents had provided no detail as to when such improvements were made and the cost thereof. In the light of my earlier findings it is not necessary to resolve this issue.

[64.] In the circumstances I am of the view that the applicants' have failed to meet all the requirements of the PIE Act, in particular in the light of the respondents' claim of acquisitive prescription with the attendant disputes of fact in respect thereof. The applicants have failed to satisfy the requirement of ownership in that where their registered title has been challenged with a claim of acquisitive prescription. They have further failed to satisfy the court that the respondents were in unlawful occupation of the property.

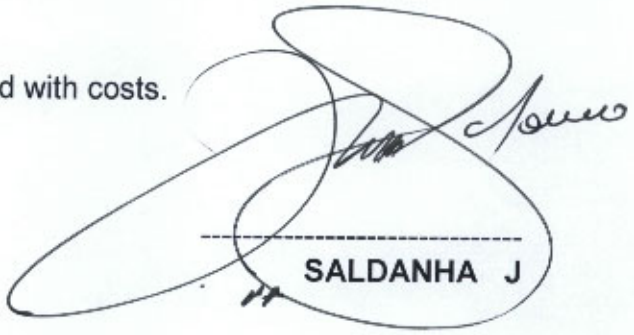
[65.] Mr. Le Roux submitted that the court should display its displeasure with regard to the first applicant's conflicting versions and his failure to place relevant information which was in his knowledge in his founding affidavit and his

conflicting versions with an award of costs on an attorney client scale in favour of the respondents.

[66.] In the circumstances of the matter, having considered the nature of the claim, I am not persuaded that it is appropriate to mulct the applicants with a punitive order of costs.

The following order is made:

It is ordered that the application is dismissed with costs.



SALDANHA J