Republic of South Africa

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

Not Reportable

CASE NO: 11877/2008

In the matter between:

ABRAHAM DANIEL MULLER N.O.	First Plaintiff
HANNALIE MULLER N.O.	Second Plaintiff
JOHAN MULLER N.O.	Third Plaintiff

and

ADRIAAN THERON	First Defendant
MEVROU THERON	Second Respondent

Court: R.M. NYMAN AJ

Heard: 26 February 2013

Delivered: 1 March 2013

JUDGMENT

R. M. NYMAN AJ

[1] The plaintiffs instituted an action against the defendants in which they claimed, *inter alia*,

"*'n Bevel wat die Verweerders gelas om op hulle koste alles te doen wat nodig is om die Eisers in onbelemmerde besit te plaas van daardie gedeeltes tans in Verweerders se besit van die eiendom beskryf as Erf 19657, Paarl, gelee in die Munisipaliteit van Paarl, Wes-Kaap, Groot 785 vierkante meter, gehou deur die Eisers kragtens titelakte nommer T46227I2007].*"

[2] A beacon certificate of Erf 19657 dated 6 March 2006 which contains a description of the encroachment, is annexed to the combined summons. The beacon certificate shows that the encroachment area, described as encroachment "B", is 33m².

[3] In their plea, the defendants admit that the plaintiffs are the registered owners of the encroachment, but claim that a predecessor in title of the plaintiffs had built a wall on the area of encroachment in and around 1965 and consequently, the defendants and their predecessors have to the exclusion of the plaintiffs and to their benefit, been in possession of the encroachment and had acquired possession thereof by means of acquisitive prescription.

[4] In their counterclaim, the defendants aver that they have become the owners of the encroachment in terms of the Prescription Act 2 of 1969 (the Act) on the ground that they have had exclusive possession and control of the encroachment for a period of more than 30 years.

[5] In his opening statement, Mr Cuyler, on behalf of the plaintiffs correctly submitted that in the light of the admissions made in the plea, the defendants carried the *onus* of proving acquisitive prescription. Accordingly, the defendants opened

their case by leading the evidence of Mr Adriaan Theron.

[6] Mr Theron testified that the defendants had purchased Erf 8912 from a certain Mr and Mrs Lambrecht and that transfer had taken place on 2 September 2001. He referred to a letter dated 27 September 2006 from the Drakenstein Municipality that confirmed that the border wall located on his Erf was built in terms of building plan 117/68. The beacon report shows that this vibracrete wall is located on the south side of the encroachment and forms the boundary of the defendants' Erf.

[7] Mr Theron confirmed that he had signed the offer to purchase on 1 September 2001 and the addendum annexed thereto. This addendum contains a confirmation that the encroachment agreement dated 19 May 1999 concluded between Dr D Boussard, the previous owner of Erf 8912 and Mr Lambrecht, had been explained Mr Theron. Mr Theron however denied that he was bound by the addendum for the reason that he had signed this addendum under protest. He stated that he was compelled to sign the addendum because he had already sold his previous house and would have had no place to live if he had not concluded the sale.

[8] Mr Theron confirmed under cross examination that he had received a copy of an affidavit deposed to by Mr Lambrecht wherein he confirmed that Jock McKenzie, the previous owner of Erf 19657, had no objection to him making use of the encroachment, but that had not indicated to him that he could take ownership of the encroachment. He acknowledged addendum "A" which is attached to the addendum annexed to the offer to purchase. Addendum "A" records the following:

"*OORSKRYDING : TOESTEMMING*

Hiermee erken ek, Mnr S.J. Lambrechts van Durrstraat 9 Erf No. 8912, dat ek bewus is van die oorstryding op Erf 19657 wat behoort aan D. Brussaard, Paspoort No. X096096, van Victoriastraat 9, Paarl.

Dr. Brussaard het vir my op 19 Mei 199 die grenspenne uitgewys wat die skeiding tussen Erf 19657 en Erf 8912 aandui.

Dr. Brussaard gee toestemming dat hierdie oorskrydingsreëling tydelik mag voorgaan, maar behou himself die reg voor om sy eiendom te enige tyd te mag herbetree met die doel om dit in herbesit te mag neem. Skriftelike kennisgewing sal voor herbesit aan oorskryder gegee word."

[9] The defendants closed their case in respect of their defence and counterclaim at the end of Mr Theron's evidence. Thereafter, the plaintiffs sought absolution from the instance in respect of the counterclaim on the ground that the defendants had not proven that they had held possession for a continuous period of thirty years as prescribed by the Act. The defendants opposed the application.

[10] After I heard submissions in respect of the application for absolution from the instance, Mr PJ Theron appearing on behalf of the defendants, from the Bar placed in dispute the admissions made in the plea regarding the fact that the plaintiffs are the registered owners of the encroachment. In the light of these submissions, Mr Abraham Muller gave evidence on behalf of the plaintiffs. He confirmed that the plaintiffs are the registered owners of the encroachment with reference to the Conveyancer's Certificate, Surveyor General report and Deeds Office report.

[11] I now turn to consider the plaintiff's application for absolution from the instance in respect of the defendants' counterclaim, and thereafter I will consider the plaintiff's case.

[12] The test for absolution from the instance is set out in *Claude Neon Lights (SA) Ltd V Daniel* 1976 (4) SA 403 (A) in the following passage at 409F:

> "*It is to that question that I now turn, bearing in mind that, when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter, 1917 T.P.D. H 170 at p. 173; Ruto Flour Mills (Pty.) Ltd. v Adelson (2), 1958 (4) SA 307 (T)).*"

[13] Section 1 of the Act stipulates that:

> "*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.*"

[14] Evidently, the defendants took possession of the encroachment on the date

when they purchased Erf 8912 during 2001. The defendants received written notice on 15 November 2007 from the plaintiffs of their intention to regain possession of the encroachment, thus interrupting the defendants' period of possession. Given that the defendants themselves had not possessed the encroachment for a period of thirty years, the determining issue is whether there is evidence to support a conclusion that the defendants' predecessors in title had possessed the encroachment openly and as if they were the owners for a period of 24 years. In my consideration of the evidence, I have to determine whether I could or might find for the defendants, upon applying my mind reasonably to such evidence.

[15] In my view Addendum "A" that was signed during 1999 in terms of which Dr Broussard, (plaintiff's predecessor in title) had a granted permission to Mr Lambrecht (defendants' predecessor in title) to occupy the encroachment on a temporary basis, without waiving his right of ownership, is dispositive of the defendants' case. The defendants' predecessor in title not only knew that he was not the registered owner in title of the encroachment, but he also concluded a written agreement with his predecessor in title that he was occupying the encroachment as an indulgence. This written evidence does not therefore support the conclusion that the defendants possessed the encroachment as if they were the owners, in circumstances where Mr Theron in his evidence, admitted that he had signed the offer to purchase and the addendum thereto. In my view, by doing so, the defendants "*manifestly* [*recognised*] *the true owner's rights*" (*See*: *Ploughman NO v Pauw and Another* 2006 (6) SA 334 (C) at 355 B – D).

[16] I am unable to agree with the written submission made by Mr PJ Theron that the drawing of the vibracrete wall in the building plan can be construed to mean that

the plaintiffs to waived their right to ownership of the encroachment. In my view, I do not need to consider Mr Theron's evidence that he had signed the addendum under duress, in the light of the proven evidence that the defendants' predecessor in title had not possessed the encroachment openly as if he was the owner. In any event, I do not find Mr Theron's evidence to this effect, convincing.

[17] On a reasonable interpretation of the evidence, I do not find that the defendants could prove their counterclaim in respect of acquisitive prescription. I should therefore grant absolution from the instance in respect of the defendants' counterclaim. I am not in agreement with Mr Cuyler, on behalf of the plaintiffs, that the counterclaim justifies costs on the scale of attorney and client in the absence of submissions made in support of such an order. Mr Theron's demeanour in the witness box bears testimony to his belief that he enjoyed a legitimate claim, and therefore, I do not find the institution of the counter-claim as conduct that requires me to mark my disapproval.

[18] I now consider the plaintiffs' claim. The defendants have not proven that they had acquired ownership by acquisitive prescription. The undisputed evidence before me is that plaintiffs are the registered owners of the encroachment and therefore, the plaintiffs should succeed with their claim.

[19] In their particulars of claim, the plaintiffs seek restoration of ownership of Erf 19657, in extent of 755 square meters. Clearly the plaintiffs are already the registered owners of Erf 19657 and therefore they are not entitled to the relief so pleaded. The plaintiffs are merely entitled to restoration of possession of the encroachment.

[20] For the aforesaid reasons, the following orders are therefore granted:

[a] An order compelling defendants, at their costs, to take whatever steps necessary to restore to plaintiffs possession of the encroachment currently in defendants' possession, described in the beacon certificate dated 6 March 2006 as encroachment "B", in extent of 33 square meters, constituting a portion of the property described as Erf 19657, situated in the Municipality of Paarl, Western Cape and held by plaintiffs in terms of Title Deed No. T46227/2007.

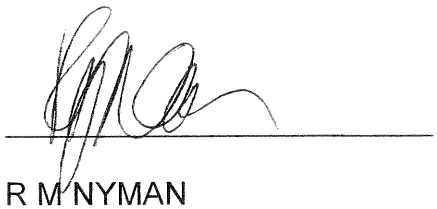
[b] That such restoration shall be effected by defendants within thirty (30) days from the date of this order;

[c] Should defendants fail to act as aforesaid, an order entitling and ordering the Sheriff to, at the costs of defendants, to take whatever steps necessary to restore plaintiffs' possession as referred to hereinabove;

[d] That defendants pay plaintiffs' costs of the claim jointly and severally;

[e] The defendants' counterclaim is dismissed with an order of absolution from the instance;

[f] That defendants pay the plaintiffs' costs of the counterclaim jointly and severally.



R M NYMAN

Acting Judge of the High Court