

# The difficulty of proving the essentials of acquisitive prescription

## Minnaar v Rautenbach 1999 1 All SA 571 (NC)

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The institution of acquisitive prescription was recently discussed in *Minnaar v Rautenbach* 1999 1 All SA 571 (NC). The case raised important questions about the application of the requirement of non-precarious consent, and the extent to which the period of possession of predecessors may be included in the prescriptive period. The maxim that prescription runs only against a person who is capable of challenging it was also addressed. In spite of numerous judicial pronouncements on this issue, it seems that there is still confusion about the application of the principles of acquisitive prescription in our courts.

The facts of the case may be briefly summarised as follows: In 1946, Gordon Spring Rautenbach (Gordon) inherited a one-seventh share in the farm Klipkolk, together with his five living brothers and sisters and his deceased brother. He was appointed as the executor of the latter's estate. In 1947, three-sevenths of Klipkolk was transferred into Gordon's name from his siblings, and in 1954 he received transfer of another two-sevenths, also from his siblings. He therefore became the owner of six-sevenths of Klipkolk. On 9 May 1958 Gordon transferred his six-sevenths of the farm, together with the neighbouring farms Fairview and Mooiriver, to the applicant's father, WA van Jaarsveld Minnaar ("Minnaar").

The latter died on 26 December 1964, and the property was left to his five children, subject to a usufruct in favour of his wife (the applicant's mother) until she died or remarried. The applicant's mother continued to possess the farm in terms of her usufruct until December 1979, when she remarried. She then leased the farm from her children. The applicant took over the lease from his mother at the beginning of 1986. In November 1990, he became the owner of the property (Moorriver, Fairview, and six-sevenths of Klipkolk) by taking transfer from his siblings. The applicant sought a declaratory order to the effect that he had become the owner of the one-seventh portion of Klipkolk (which was still owned by Estate Late Rautenbach) through acquisitive prescription. This was opposed by the respondent, David Sarel Rautenbach, a beneficiary of the estate which owned the disputed portion of Klipkolk. As the period of prescription started before and ended after the commencement of the Prescription Act 68 of 1969 ("the 1969 Act"), both the Prescription Act 18 of 1943 ("the 1943 Act") and the 1969 Act were applicable.

The 1943 Act requires that possession for 30 years of a movable or immovable of another be *nec vi, nec clam, nec precario* for the acquisition of ownership through prescription. The 1969 Act imposes virtually the same requirements on the potential owner, except that it replaces the *nec vi, nec clam, nec precario* requirement with the formulation "openly and as if he were the owner". The court held that the 1943 Act did not change the common-law requirement for acquisitive prescription, *possessio civilis*. The judgment in *Welgemoed v Coetzer* 1946 TPD 701 710 and a translation of Voet (cited in *Welgemoed v Coetzer* 712-713) were relied on as authority. The court went further to say that the 1969 Act in turn changed nothing in relation to the

nature of the possession required by the 1943 Act. Van der Merwe *Sakereg* (1989) 280 was cited as authority for this.

Two main defences were raised by the respondent. The first revolved around the *nec precario* requirement in terms of the 1943 Act, which is incorporated in the formulation "as if he were the owner" in the 1969 Act. The argument was to the effect that the applicant was in possession of the land with the knowledge that he held it under sufferance, and thus under precarious consent. This meant, so it was argued, that his possession was *precario*. The second defence was that the respondent was not aware of his ownership of the said portion of land, and therefore could not interrupt prescription. A final argument was that the applicant and his predecessors could never have possessed the property as though they were owners, for they knew that they were not. Van der Walt J, however, paid practically no attention to this last argument as a result of its lack of merit. Neither will I.

The first point raised by the respondent was that Minnaar possessed the land under precarious consent. The argument was that when Gordon transferred the properties to Minnaar, he (Gordon) must have been aware of the fact that he owned only six-sevenths of Klipkolk, since he was the executor of the estate which owned the other seventh. The respondent argued that it was highly probable that Gordon would have informed Minnaar of the status of the one-seventh, and hence would have concluded an agreement with regard to the use of it, since the whole of Klipkolk was farmed as a single unit. If the respondent's argument was accepted, that agreement would constitute precarious consent and one of the requirements for acquisitive prescription would be lacking.

The judge agreed with the applicant, and ruled that the arrangement or agreement ("reëling of ooreenkorns") (576b) referred to by the respondent amounted to mere speculation, as there was no factual proof of its existence. Since the respondent had failed to prove that such an arrangement or agreement existed, let alone what its content would or could have been, the court was not prepared to make any assumptions on the basis of such a supposed arrangement.

The onus is on the applicant to prove that his possession complied with the various statutory requirements - in this case, that he possessed the one-seventh portion of Klipkolk *nec precario*. The respondent made allegations in relation to the existence of some sort of agreement which might have cast doubt on whether the applicant's possession was *nec precario* or not. All that Van der Walt J said, however, was that the applicant had discharged his onus *prima facie*:

"Ek is van mening dat sy bewerings in die verband *prima facie* aan die nodige vereistes voldoen" (575b).

Was the court correct in accepting, without more, that the applicant had discharged the onus of proving that his possession had been *nec precario*? Did the submission of the respondent in relation to the existence of an agreement not raise sufficient doubt for the judge to have required more solid proof from the applicant to discharge the onus? Could the court simply reject the respondent's allegations and state that they amounted to mere speculation ("Ek stem saam met die applikant se standpunt dat hierdie bewering van die respondent bloot op spekulاسie neerkom ... " (576b))?

In *Markets Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 2 SA 464 (W) Colman J stated that the possibility that the applicant may have asked permission to use the disputed portion of land was enough to create doubt about whether his possession was *nec precario*:

"Another possibility is that Mr E Morkel, before he began to make use of the open ground, properly and honourably sought and obtained precarious permission to do so ...

"I would be inclined to say, on that analysis alone, that the plaintiff had failed to discharge its *onus* of proving that its tenure and that of its predecessors was *non precario*" (471 H-in line).

Van der Walt J commented on the validity of the alleged agreement in a puzzling *obiter dictum*. He stated that even if Gordon had concluded such an agreement, the fact that he as executor of the estate did not have the capacity to do so, would render the agreement invalid, which would mean that it would have no effect on the running of prescription:

"Om enige effek op verjaring te hê moes dit 'n ooreenkoms of reëling wees of gewees het waartoe Gordon op daardie stadium bevoegdheid gehad het" (576b).

The court then held that Gordon did not have the capacity to grant permission to Minnaar for unrestricted use of the farm, to the exclusion of the beneficiaries:

"Beslis sou hy nie bevoeg gewees het om 'n reëling of ooreenkoms aan te gaan waarvolgens applikant se vader [sc Minnaar] vergunning tot onbepaalde gebruik van 'n bate van die boedel verkry het tot nadeel van die regte van die erfgenaam nie ... " (576f-g).

In my view, it may be argued that if the precarious consent (agreement) was invalid, the possessor could still have been in possession *nec precario*. Was Van der Walt J correct in concluding that, since the agreement (precarious consent) was invalid, it would have no effect on prescription? In my submission, the invalid consent would surely affect acquisitive prescription, for the *animus* of the possessor would not then be the *animus domini* (the will of an owner). If the possessor believes that his possession is subject to precarious consent, he does not have the intention to be the owner, even though the consent is invalid. *Nec precario* is only one of the requirements of acquisitive prescription, and in this case possession might have been *nec precario*, but it was definitely not *animus domini*.

The second defence raised by the respondent - on the authority of *Barker v Chadwick* 1974 1 SA 461 (D) 466A - was that he did not have a legal right to oppose the running of prescription. Gordon was the executor of the estate (which included one-seventh of Klipkolk) of which the respondent was a beneficiary. At his (Gordon's) death in 1960, no new executor was appointed and the respondent claimed that there was no official to oppose the running of prescription on behalf of the estate. The judge refused to accept this argument, as a new executor could have been appointed at any time to interrupt the period of prescription on behalf of the estate.

The further argument was that the respondent was not aware of the fact that he was the owner of the disputed portion of land, and was therefore not in a position to oppose the running of prescription. This argument could have been dismissed on the basis that the respondent never was the owner of the land, as he had never taken transfer from the executor. On the supposition that he was in fact the owner, Van der Walt J rejected the argument, relying on *Pienaar v Rabie* 1983 3 SA 126 (A) as authority for the proposition that a person who has no knowledge of his ownership, can lose his ownership by means of prescription even if there is no negligence on his part. With reference to Van der Merwe *Sakereg* 2 ed (1989) 280, the judge accepted that the rationale for the acquisition of ownership by prescription is not based on the negligence or fault of the owner.

Unfortunately, there is one fundamental aspect of acquisitive prescription which was not argued by the respondent: that of *accessio possessionis*, or the addition of the possession of predecessors in title to make up Minnaar had not yet become owner of the disputed one-seventh portion of Klipkolk by the time he died. Ownership of the other six-sevenths was passed to his children, subject to a usufruct in favour of his wife. The wife was then the possessor, and if she wished to continue the period of possession of her husband in order to become owner, she too would have had to comply with the requirements for acquisitive prescription. In *Welgemoed v Coetzer* it was held that when the applicant's son farmed the farm, he was operating subject to revocable permission from his father. This constituted an interruption in the period of acquisitive prescription claimed by his father, for the son's *animus* was not the *animus domini* and his period of possession could therefore not be added to the period of possession of his father in order to acquire ownership by means of prescription:

"The limited *possessio naturalis* of a lessee, *commodatarius* or the like, is not sufficient, for each of these persons lacks the intention of acquiring and keeping the property for himself' (1946 TPD 713).

I submit that the occupation by the applicant's mother of the one-seventh portion of Klipkolk did not amount to *possessio civilis* and therefore caused a voluntary interruption of the period of prescription. She never intended to own the one seventh portion of Klipkolk, since she intended only to use it in terms of her usufruct. By recognising her status as usufructuary, she tacitly acknowledged that she was not the owner of the six-sevenths portion of Klipkolk, and by implication she would not have been able to exercise control over it with the *animus domini*.

Unless it could be proved that she exercised physical control as agent of her children for the duration of her usufruct, the running of prescription would have been interrupted. The effect of such an interruption in the prescriptive period is that prescription starts to run *de novo*. The applicant's mother remained in possession in terms of the usufruct until 1979, after which she hired the farm from her children until 1986. Her lease of the farm would still not give her the required possession to acquire the disputed portion of the farm through acquisitive prescription (see *Welgemoed v Coetzer*). Then there is the period from 1986 to November 1990 when the applicant himself leased the six-sevenths of Klipkolk from his siblings. During this period he surely did not possess with the *animus domini*.

In conclusion, it must be said that, for the two reasons stated above, there is doubt as to the correctness of the judgment. First, the onus which rested on the applicant to prove his possession to be *nec vi, nec clam, nec precario* was perhaps too easily discharged. Secondly, and more notably, the possession of one of the applicant's predecessors (his mother) did not comply with the statutory requirements for it to be reckoned in the necessary prescriptive period of 30 years. From the judgment it appears that certain aspects of the notion of *possession civilis* are still not properly understood, specifically the required *animus* of the possessor. The possessor must be in possession with the intention of being owner (*animus domini*), or must be an agent on behalf of a person with the *animus domini*, in order for ownership to be acquired through prescription. If the possessor believes that he possesses under sufferance (even if he is mistaken), or if he recognises that he is not and will not be the owner (eg by possessing in terms of a usufruct), then he does not have the necessary *animus* to acquire ownership through prescription.