

SOUTH AFRICA / JUDGMENT

Pocock v De Oliveira and Others

(06/2889) [2006] ZAGPHC 245; 2007 (2) SA 90 (W) (10 October 2006)

[2006] ZAGPHC 245

COURT

High Courts - Gauteng

BEFORE

M Jajbhay

CASE / FILE NUMBER

06/2889

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 06/2889

DATE:10/10/2006

In the matter between:

POCOCK, ESTELLE.....Applicant

and

DE OLIVEIRA, LUIS FILIPE SELEIRO CASALES.....First Respondent

THE CITY OF JOHANNESBURG.....Second Respondent

THE REGISTRAR OF DEEDS.....Third Respondent

J U D G M E N T

JAJBHAY, J:

INTRODUCTION

[1] The applicant seeks an order in the following terms:

“1 That a declaratory order be granted declaring that:

Erf 5554 and Erf 5555 Kensington Township Registration Division IR the Province of Gauteng were notarially tied pursuant to the Notarial Agreement dated 17 September 1938 and registered under Contract No: F163/1938 on 27 September 1938;

Alternatively

Erf 5554 and Erf 5555 Kensington Township Registration Division IR the Province of Gauteng became tied through prescription;

2 That Erven 5554 and 5555 Kensington Township Registration Division IR the Province of Gauteng be regarded as one property for

all intents and purposes and that none of the erven shall be sold or transferred otherwise than to the same transferee;

3 That the First Respondent be ordered to transfer to the Applicant Erf 5555 Kensington Township Registration Division IR the Province of Gauteng, failing which the Sheriff be authorised to effect the transfer of Erf 5555 Kensington Township to the Applicant, to be held in one single title deed;

3A That the Third Respondent be ordered to:

Amend Deed of Transfer number T72841/2001 to show that Applicant is the owner of both ERF 5554 Kensington Township and ERF 5555

Kensington Township.

2. Cancel Deed of Transfer number T6567/1998.

That the Order shall be registered against the Title Deed of Erf 5554 and Erf 5555 and shall be binding on the successors-in-title of the Applicant;

That the First Respondent be ordered to pay the costs of this application and in the event of the application being opposed by the Second and/or Third Respondents, that the costs be paid by such Respondents jointly and severally with the First Respondent;

That all costs of preparing, executing and registering the Deed to effect transfer of Erf 5555 Kensington Township to the Applicant be paid by the First Respondent;"

[2] The first respondent opposed the relief sought. He has not filed an answering affidavit. Instead, the first respondent has filed a notice in terms of Rule 6(5)(d)(iii) stipulating the questions of law that he intended raising at the hearing of the application. The questions of law set out in the first respondent's notice in terms of Rule 6(5)(d)(iii) were recorded as follows:

"IN LIMINE

That the relief sought against the first respondent by the applicant in the application has become prescribed and is accordingly unenforceable against the first respondent, as:

Erf 5554 was transferred to the applicant on 6 December 2001;

The application was issued on 10 February 2006 and served thereafter; and

The applicable period of prescription is 3 (three) years.

Accordingly, the first respondent will seek a dismissal of the applicant's application with costs on the attorney-and-client scale.

TAKE NOTE THAT, should the first respondent's point in limine not be upheld, the first respondent intends to raise the following questions of law at the hearing of the application:

The applicant's conclusion regarding the intention of the parties to the 1938 notarial agreement is incorrect as it is:

Premised upon an incorrect reading of the notarial agreement; and

Contrary to the clear wording of the notarial agreement.

Title conditions are relaxable.

Erf 5555 is capable of use by the first respondent and forms an asset belonging to him.

The notarial-tie agreement analogy is ill-conceived as it:

Is premised upon an erroneous interpretation of the notarial agreement; and

Ignores the nature of such a notarial tie agreement.

The applicant's alternative contentions regarding prescription are erroneous and forms no basis for the relief sought as the common law and statutory requirements for relief based upon prescription are absent.

The applicant has alleged no legal or factual basis for the transfer of the immovable property to her and is in effect attempting to create a new, as yet unknown to the South African law, method of transferring ownership in immovable property.

The applicant has failed to properly or at all exercise her remedies, if same exist at all, against the appropriate parties.

In addition to a dismissal of the applicant's application, the first respondent will seek attorney-and-client-scale costs against applicant."

THE FACTS

- [3] The applicant is the owner of certain immovable property described as Erf 5554 Kensington Township, Registration Division IR, the Province of Gauteng and which is situated at 86 Westmoreland Road, Kensington, Johannesburg. The first respondent is the registered owner of Erf 5555 Kensington Township, Registration Division IR, the Province of Gauteng. The latter property is landlocked without any servitude of way and accordingly has no street

address. The applicant alleges that Erf 5554 and Erf 5555 have become tied and for that reason, Erf 5555 is also situated at 86 Westmoreland Road, Kensington.

- [4] According to the applicant, erven 5554 and 5555 constitute a block, which is fenced in as one unit, with no boundary or fence between them. The two erven have been developed jointly with a single house built thereon. The house is situated on Erf 5554. The outbuilding that forms part of the residence, extends from Erf 5554 over onto Erf 5555. There is a swimming pool on erf 5555. The pool forms part of the improvements which is servient (according to the applicant) to Erf 5554. The applicant further explains that the garden extends from Erf 5554 and flows naturally as a single unit onto Erf 5555, with no visible boundary or separation

between the two erven. The applicant argues that the existence of the two erven is de facto that of a single erf.

- [5] According to the applicant, the second respondent does not render municipal services such as electricity, water, sewerage and refuse removal to Erf 5555. However, such services are rendered to Erf 5554. The second respondent however, collects property rates and taxes on separate accounts in respect of Erf 5554 and Erf 5555. Both these properties are 495 square metres in size. Erf 5554 borders onto a public road, namely Westmoreland Road, Kensington.
- [6] There is no servitude of way in favour of Erf 5555 over Erf 5554 or any other land that would permit access from a public road to Erf 5555.
- [7] There are no structures situated on Erf 5555 which can be used as a residence by reason of the conditions of title, which I will set out more fully hereinbelow. As such, no residence can be built on the property.
- [8] A similar situation exists in respect of 14 other properties neighbouring Erf 5554 and Erf 5555, which have been divided into blocks comprising of two erven and which have been developed and utilised, according to the applicant, as if they are for all intents and purposes one single property. The applicant has investigated the history of the properties through the offices of the third respondent. The applicant established the following:

8.1 on 20 September 1907, Frederick Augustus Alexander became the owner of 24 erven, being Lots marked 5546, 5547, 5548, 5549, 5550, 5551, 5552, 5553, 5554, 5555, 5556, 5557, 5562, 5563, 5564, 5565, 5606, 5607, 5608, 5609, 5610, 5611, 5612 and 5613, situated in Westmoreland Road, Royal Oaks Street and Nottingham Road on that portion known as Kensington Township of the Freehold Farm Doornfontein No. 24, District Johannesburg. The erven all measured 34 square rods, 104 square feet (495 m²). These properties were held each under their own title deed.

8.2 the title deeds were, inter alia, subject to the following conditions:

“22.2.1 ‘Seventh – the said lot may not be subdivided nor may it be split up and sold or disposed of in less than lots of four lots each, except with the consent of the Company in writing for that purpose first had and obtained’;

22.2.2 ‘Eighth – the buildings to be built upon the said lots shall be of a substantial character, and constructed of brick or stone, or other material to be approved by the Company and the Transferee shall not commence building until he shall have submitted the plans and specifications of such building to the Company, and shall have received the consent and approval of the said Company in writing of such plans and specifications; and it is further stipulated that unless the said Company in writing that purpose be first had and obtained, only one residence with stables and outhouses may be built upon one block of four lots as owned by the Transferee, but the Transferee shall have the right to select the position of the buildings, having due regard to the frontage line hereinafter mentioned.’

8.3 On 29 April 1938, the 24 aforementioned lots owned by Alexander were transferred to Gabriel Andries Venter, in terms of a Deed of Transfer No. F3518/1938. .

8.4 The Deed of Transfer, in terms of which Venter acquired the properties, was subject to the same terms and conditions which I have quoted above.

8.5 On 27 September 1938, the Assistant Rand Townships Registrar noted on the front of this Deed of Transfer, a notarial agreement dated 17 September 1938, which was registered under Contract No. 163/1938, affecting the conditions of title in respect of certain of the erven, including Erven 5554 and 5555 Kensington Township.

8.6 The applicant obtained from the Third Respondent a copy of the notarial agreement registered in the Register of Servitudes and Contracts No. F163/38, on 27 September 1938, dated 17 September 1938. In terms of this notarial agreement the township owner was Norwich Union Life Insurance Society. Venter being the owner of the properties affected by the notarial agreement and the City Council of Johannesburg, concluded an agreement which sought to amend the conditions of title as contained in the Deed of Transfer in respect of the 24 lots owned by Venter listed above.

8.7 The terms of Clause 2 on page 7 of the agreement, the seventh condition, as it appeared in Deed of Transfer NO. 3518/a38, was deleted and submitted with the following:

‘The said lot may not be subdivided nor may it be split up except with the consent of the township owner, or its successors-in-title or assigns, in writing for that purpose first had and obtained.’

8.8 In terms of the third term of the agreement, the eighth condition of Deed of Transfer No. 3518/38 in so far as it concerned inter alia, Erven 5554 and 5555, was amended to read as follows:

‘The buildings to be built upon the said lot shall be of substantial character, and constructed of brick or stone or other material to be approved by the township owner or its successors-in-title or assigns, and the transferee shall not commence building until he shall have submitted the plans and specifications of such building to the township owner or its successors-in-title or assigns, and

shall have received the consent and approval of the said township owner or its successors-in-title or assigns in writing of such plans and specifications; and it is further stipulated that unless the consent of the said township owner or its successors-in-title or assigns in writing for that purpose first had and obtained, only one residence with stables and outhouses may be built upon each of the blocks comprised of (a) lots Nos. 5546 and 5547, (b) lots Nos. 5548 and 5549, (c) lots Nos. 5550 and 5551, (d) lots Nos. 5552 and 5553, (e) lots Nos. 5554 and 5555, (f) lots Nos. 5556 and 5557, (g) lots Nos. 5606 and 5607, (h) lots Nos. 5608 and 5609, Kensington, but the transferee shall have the right to select the position for the buildings, having due regard for the frontage line hereinafter mentioned.'

8.9 On 10 January 1940, the block comprising of Erven 5554 and 5555 was sold under one Deed of Transfer No. F113/40 to Mike Weiner.

8.10 Weiner became owner of the property subject to the conditions set out therein.

8.11 On 7 March 1942, the block comprising of Erven 5554 and 5555 was transferred to Samuel James Wilson under a single title deed, No. 1796/1942.

8.12 The same relevant conditions of title relating to the subdivision and splitting up of the properties and the residence to be constructed on the two properties are contained in the sixth and seventh condition of title.

8.13 On 28 November 1972, the block comprising of Erf 5554 and Erf 5555 Kensington Township, was transferred to René Marguerite Wilson, the widow of Samuel James Wilson, under title deed 18679/1972.

8.14 On 26 February 1975, the block comprising of Erven 5554 and 5555 Kensington Township was transferred in a single Deed of Transfer No. 3668/1976 to James George Marshall Orr.

8.15 On 30 June 1976 the block comprising of Erven 5554 and 5555 was transferred in a single Deed of Transfer, to Ronald Delano Wiesner.

8.16 On 9 February 1990 the block comprising of Erven 5554 and 5555, was transferred to Johan Wiesner and Daphne Anne Wiesner, who were married to each other in community of property in a single Deed of Transfer No. T4793/1990.

8.17 Daphne Anne Wiesner died on 8 October 1996 and Johan Wiesner died on 18 June 1997.

8.18 On 5 February 1998, the undivided half share in the property consisting of Erf 5554 and Erf 5555 owned by Daphne Anne Wiesner was transferred to the estate to Johan Wiesner

8.19 On the same day in February 1998, the block comprising of Erf 5554 and Erf 5555 Kensington Township, was transferred in a single deed of transfer No. 6567/1998 to the First Respondent.

8.20 On 12 October 2001, the Sheriff caused Erf 5554 Kensington Township to be sold by public auction. This was pursuant to a warrant of execution that was issued out of the office of the Magistrate's Court for the district of Johannesburg on 11 July 2001. This warrant of execution was issued in an action instituted by the Second Respondent against the First Respondent in respect of arrear rates and taxes levied by the Second Respondent against the First Respondent in respect of Erf 5554.

8.21 The bid for R141 000, 00 was closed on Du Plessis on 12 October 2001. The applicant entered into a written agreement of sale with Du Plessis, in terms of which she purchased from Mr Du Plessis, the property situated at 86 Westmoreland Road, Kensington, Johannesburg. The purchase price was R250 000, 00.

8.22 The property was, however, transferred by the Sheriff directly to the applicant.

8.23 The applicant referred to Conditions F and G of the Deed of Transfer.

'F. The said lot may not be subdivided nor may it be split up except with the consent of the township owner or its successors-in-title or assigns, in writing for that purpose first had and obtained.

The buildings to be built upon the said lot shall be of a substantial character, and constructed of brick or stone or other material to be approved by the township owner or its successors-in-title or assigns, and the transferee shall not commence building until he shall have submitted the plans and specifications of such building to the township owner or its successors-in-title or assigns, and shall have received the consent and approval of the said owner or its successors-in-title or assigns, in writing for such plans and specifications and it is further stipulated that unless the consent of the said township owner or its successors-in-title or assigns, in writing for that purpose first be had and obtained, only one residence with stables and outhouses may be built upon the block comprising of lots numbers 5554 and 5555 Kensington, but the transferee shall have the right to select the position for the buildings having due regard to the frontage line hereinafter mentioned."

[9] The applicant then set out that the first respondent instituted an action against her, wherein the first respondent sought an order for the establishment of a permanent servitude of right of way of necessity over Erf 5554, based on the allegation that the first respondent required such right of way to gain access to Erf 5555 Kensington. This action is defended and the matter will be considered soon.

[10] In the light of the conclusion that I have arrived at, and the reasons that I have set out therefor, I do not believe that it is necessary for me to determine whether the applicant's claim in the present matter has prescribed or not.

NOTARIAL TIE AGREEMENTS

[11] The applicant contended that the current facts are analogous to a notarial tie agreement. These agreements are concluded between local authorities

in the position of the second respondent and the owner of two or more adjoining properties. The properties, although registered under different title deeds are for legal purposes regarded as separate, are in terms of the notarial tie agreement, tied together and regarded as one property for all intent and purpose and none of the properties may be sold or transferred otherwise than to the same transferee. The applicant relies on the affidavit of Willem Sterrenberg Roos, an attorney conveyancer and notary public. Roos sets out that:

“6. To join the separate erven and to allow for its development as a single undivided piece of land, a notarial agreement is concluded between the owner of the erven and the local authority, such as the Second Respondent, which has the following standard terms and conditions:

that the owner(s) and the council, such as the Second Respondent, agree that the erven shall be tied together and be regarded as one property for all intents and purposes;

that none of the erven shall be sold or transferred otherwise than to the same transferee. Should it, however, happen that the

erven are owned by separate owners, there exists an underlying causa such as a partnership agreement which allows for the development of the erven as a single erf;

that the agreement shall be registered against the deeds of both properties and shall be binding on the successors-in-title.”

[12] In the present matter, such notarial tie agreements have not been concluded. The properties have not been consolidated into a single erf. A notarial tie agreement, by its very definition, requires the agreement to be in writing, between the owners of the respective erven and the local authority. As I have already indicated, this has not happened in the present matter.

[13] In these circumstances, the reasoning of the applicant here is unsound.

ACQUISITION OF OWNERSHIP BY PRESCRIPTION

[14] Counsel representing the applicant submitted very faintly that the applicant may have become the owner of Erf 5555 by virtue of section 1 of the Prescription Act 68 of 1969. Section 1 reads 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.”

Here, the applicant has failed to show possession for an uninterrupted period of 30 years. In any event, mere possession of the property for a period of 30 years does not necessarily vest in the occupier a prescriptive title to 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 recognises the ownership of another; *Malan v Nabygelegen Estates* 1946 AD 562 at 574; *Bisschop v Stafford* 1974 (3) SA 1 (A).

[15] Here, the applicant's argument is not sustainable.

ACCESSION

[16] The applicant's counsel submitted that the present conundrum can be resolved by applying the principles of accession. To my mind, this is the central pillar on which the applicant's case stands. Ownership is acquired by accession when a thing or portion of a thing is incorporated by natural or artificial means into another thing. The thing incorporated is called the accessory and the thing into which it is incorporated is called the principal thing. By accession, ownership of the accessory is lost and the owner of the principal thing becomes the owner of the new entity; *Grotius Inleidinge* 291; *Voet Commentarius* 41 1 14; *Van Leeuwen RHR* 2 4 I, 2 5 I; *Van der Linden Koopmans Handboek* 1 7 2 2.

[17] Various tests have been employed in order to determine which of the two individual things have been joined together is the principal thing. These include:

the thing with the highest value;

the thing with the greatest bulk;

the thing without which the accessory cannot exist;

the thing which belongs to the person on whose account the things are joined;

the thing which is adorned by the accessory; and

the thing which gives the final entity its identity, form, name or function.

Therefore, a principal thing retains its identity after the combination. An accessory is the thing which loses its identity in consequence of the combination.

[18] Depending on the process which leads to the accession of one thing to another three types of accession, namely natural, industrial

and mixed accession are distinguished.

[19] *Innes CJ in MacDonald Ltd v Radin NO and The Potchefstroom Dairies and Industries Co Ltd* 1915 AD 454 at 466 sets out the following:

"The thing must be in its nature capable of acceding to reality, there must be some effective attachment (whether by mere weight or by physical connection) and there must be an intention that it should remain permanently attached. The importance of the first two factors is self-evident from the very nature of the inquiry. But the importance of intention is for practical purposes greater still; for in many

instances it is the determining element. Yet it is sometimes settled by the mere nature of the annexation. The article may actually be incorporated in the realty, or the attachment may be so secure that separation would involve substantial inquiry to immovable or its accessory. In such cases the intention as to permanency would be beyond dispute. But controversy generally arises where the separate identity of the article annexed is preserved, and when detachment can be effected with more or less ease. Indeed, it may happen (as has happened here) that the annexation is in itself consistent with the article either being, or not being a portion of the realty; and it does become necessary to examine with the greatest care the intention with which

it was annexed.”

In many instances, the nature of the thing or the mode of attachment may conclude the enquiry. As I understand the authorities discussed in *Sumatie (Edms) Bpk v Venter en ‘n Ander* NO 1990

- (1) SA 173 (TPD), it would appear that in each case the object of the inquiry is to ascertain whether the portion of the land claimed is so

claimed with the intention that that portion of the land should remain permanently attached thereto. Therefore, in order to ascertain whether such is the intention, regard must be had to the features such as the nature of the land that is claimed, the method and degree of its attachment, and whether such land can be attached without injury to itself or to the land which it is purported to be attached.

- [20] In the present matter, the applicant has failed to indicate that the attachment of Erf 5555 has permanently or indefinitely been affixed to Erf 5554, in such a way that such attachment forms a new independent entity. According to C G van der Merwe and M J de Waal in the *Law of Things and Servitudes*, accession to immovables can take place in the following forms: alluvion; avulsion; an island arising in a river; or a river changing its course. None of these forms apply to the facts of the present matter. In the circumstances of the present matter, the accession

denotes a verb and implies the actual and physical attachment of one thing to another. The actual and physical attachment of one thing to another is absent. This case is clearly distinguishable from an attachment of a movable to an immovable, or a movable to another movable through the annexation by human agency. Here, the applicant has failed to indicate that Erf 5555 in its nature is capable of acceding to Erf 5554. Furthermore, the applicant has failed to indicate that there was effective attachment.

- [21] The applicant’s attempt to acquire ownership through accession cannot be sustained.

GENERAL OBSERVATIONS

- [22] To my mind, the applicant purchased Erf 5554 under the mistaken impression that she was purchasing both erven. The applicant’s mistaken impression can be attributed to her not diligently investigating the property, the warrant of execution,

the conditions of sale, the sale agreement between her and Du Plessis and finally the title deed to the property. In fact, the applicant failed to take any steps for more than three years to exercise any remedies she may have had against any of the respondents in the present matter.

[23] The applicant is effectively requesting this Court to order that the first respondent transfer to her Erf 5555 simply because on her interpretation of the restrictive title conditions, the one erf could not be sold without the other. In so doing, the applicant tries to elevate a restrictive title condition contained in the notarial agreement and the subsequent title deeds being limited real rights, to real rights granting her ownership of the property. This construction ignores the fundamental difference between the two types of rights. In that it is only the first respondent that can pass legal title in the circumstances of the present case to the applicant. The first respondent is not willing to do so.

CONCLUSION

[24] The title deeds since September 1907 reflect that the properties were held each under its own title deed. They were separate and distinct from each other. The conditions and in particular the conditions that the applicant relies upon thereafter sets out the manner in which the lots have to be sold or disposed of. The mere fact that some of the lots were landlocked is fortuitous.

These lots do not form part of the lots adjacent to them. This was never the intention. It may well have been a mistaken understanding

of the applicant. However, this mistaken understanding can never give rise to a real right.

[25] The applicant has failed to establish a case that would enable her to obtain relief in terms of the Notice of Motion. Therefore, the application is dismissed with costs.

M JAJBHAY

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANTADV J F STEYN

INSTRUCTED BY.....strb ATTORNEYS

COUNSEL FOR FIRST RESPONDENT.....ADV C J BRESLER

INSTRUCTED BY.....SCHWARTZ-NORTH INC ATTORNEYS

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