IN THE LAND COURT OF LESOTHO

HELD AT MASERU **LC/APN/ 47/13**

In the Matter Between

ZION CHRISTIAN CHURCH **APPLICANT**

And

BAROLONG MOLISE **1st RESPONDENT**

EXR COMPANY **2nd RESPONDENT**

JUDGMENT

Coram : Hon. N. Majara CJ

Heard : 10 May 2016 - 30 June 2016

Delivered : 22 November 2016

Summary

Land Dispute – plea of non-joinder – party to have a direct and substantial interest in the outcome of matter for plea to succeed – alleged invalidity of title to land by applicant no defence for 1st respondent in the absence of proof of competing right thereof – Applicant successfully proved its title to the land in terms of the statutory law and the common law principle of acquisitive prescriptive possession – application granted with costs.

ANNOTATIONS

Statutes

1. Land Act of 1979
2. Administration of Lands Act No. 16 of 1973
3. Deeds Registry Act of 1967
4. Land Court Rules of 2012
5. Legal Notice No. 71 of 1980

Cases

1. Vicente v Lesotho Bank LAC (2000 – 2004) 83
2. Francisca Maseela v Enea Maseela CIV/APN/16/12
3. Matime & Others v Moruthhoane & Another LAC 1985 -1989
4. 'Manthabiseng Lepule v Teboho Lepule C of A (CIV) NO.5/2013 (unreported)
5. Basutoland Congress Party v Director of Elections & Others (LAC) 1995 - 1999 587 @ 599
6. Gordon v Department of Health (337/2007) (2008 - ZASCA 99
7. Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)
8. Jacobs & En Ander v Waks En Andere 1992 (1) SA 521
9. Minister of Safety & Security v Gabrielle Lupacchini & Others [2009] ZAFSHC 82 (3 September 2009)
10. Morkels Transport v Melrose Foods & Another 1972 (2) SA 464

[1] This matter commenced by way of an originating application pursuant to the provisions of the **Land Court Rules**[1]. In terms of its founding papers, the applicant, the Zion Christian Church (ZCC) is seeking amongst others, an order declaring it to be the lawful owner of the land which is the subject matter herein. It is common cause that the dispute arose when the applicant sought to fence its site through which the 1st respondent passes to access his which is adjacent to it.

[1] Section 11 of the Rules of 2012

[2] The applicant alleges that it has been in peaceful occupation of the site since 1980 and had allowed the 1st respondent to pass through to gain access to his site. However, sometime in 2010, the 1st respondent started making developments on the site, contrary to the arrangement that was made amicably between the parties. The 1st respondent denies that the part on which he is developing belongs to the applicant and contends that it belongs to him.

[3] The prayers sought in the originating application are stated in the following terms: That a rule Nisi be issued and made returnable on a date to be determined by this Honourable Court, calling upon the Respondents to show cause, if any, why;

a) The rules of this Honourable Court as to form, notice and service shall not be dispensed with on account of urgency;
b) The Respondents shall not be interdicted from building on and fencing the Applicant's site pending finalization of this matter;
c) The Applicant's and the 1st respondent's agreement that the latter temporarily occupy the former's site shall not be cancelled.
d) The Respondents be directed to un-fence and un-occupy the portion of the applicant's site that it has already fenced and occupied.
e) The applicant be declared as the rightful and lawful owner and occupant of the site in issue.
f) Payment of the costs of suit
g) Alternative relief.

[4] In his answer, the 1st respondent raised a preliminary objection of non-joinder on the ground that the land which is the subject matter of the dispute does not belong to him but to one Ts'iu Khoeli and the applicant being fully aware of this fact, failed to join the said Khoeli who has an interest in the

outcome of these proceedings. It is his case that this failure renders the application fatally defective.

[5] On the merits, the 1st respondent's case is that the applicant has no title whatsoever to the land in issue because the Form C which it obtained in 1980 is null and void as it was obtained contrary to the law and as such all the rights it might have had were never lawful and it was never the rightful owner and/or occupier of the disputed site.

Factual Background

[6] Facts that are not in dispute are that the applicant church occupies a site situated at Ha Mabote, Mapeleng since 1979. When the church acquired the site, it had a four roomed house and was a donation from one Paulina Mabitso who was one of its congregants. The said Paulina introduced the applicant to the Chief of Mapeleng Ha Mabote and requested her to formalise the donation and grant title thereof to the church.

[7] The then Chief of Mapeleng assigned the village committee to inspect the site and to confirm its measurements. After the inspection, the applicant was issued a Form C bestowing title thereof to it. The church has been in peaceful occupation of the same land to date. The 1st respondent built toilets for the church although the reason behind is in dispute.

[8] Facts that are in dispute are that sometime around 2010, the 1st respondent approached the applicant church, introduced himself to its members and sought permission to use or pass through the applicant's site to get to his which is adjacent to that of the church. He also disputes that he asked them to extend the same right of use to Rumdel Construction Company which would be working on his site.

[9] At the trial, the applicant called three witnesses to the stand, namely, Petrose Tamolo (PW1), Sekhoane Molelle (PW4) and Chief Mabohlokoa Majara (PW3). The first two witnesses are church members. They both testified that they were appointed by the church committee to represent it in these proceedings.

[10] PW1 gave evidence that the land in question was lawfully allocated to the applicant by the chief of Mapeleng, Ha Mabote assisted by her Advisory Committee. Further that the site used to belong to one Paulina Mabitso who has since passed away. He handed into court as evidence, a document entitled Form C which he alleged gave the applicant title to the said land. The document was handed in and was marked **Exhibit C**.

[11] The witness further told the Court that the applicant has been in occupation of the site since 1980 to date. In 2010, the applicant was approached by the first respondent who informed them that he was the owner of the site adjacent to the applicant's site. He sought permission to pass through the applicant's site and his request was granted. Around 2010, Rumdel Construction Company was also allowed to pass through the site at the request of the 1st respondent.

[12] Further that Rumdel also approached the applicant and requested that it be allowed to use the applicant's toilets and water and in return they will pay the applicant rent which request was accepted. After Rumdel left, it was replaced by a company called EXR Construction and the 1st respondent again approached the church requesting that the same arrangement that was previously made with Rundel be extended to EXR and that request was granted.

[13] One Sunday after the arrangement was made with EXR, the applicant church members noticed that EXR had fenced the site adjacent to theirs and in the process, had encroached on a portion of theirs that it had been allowed to use as a path way. This was on the northern site. The members approached EXR and the response they got was that the fence will be dismantled as the company will use the site temporarily and this was agreed between the parties.

[14] PW1 stated further that they, members of the applicant church were surprised when they noticed that the 1st respondent was now constructing some walls and fenced them within the applicant's property. When he was approached about this, his former good attitude changed and he claimed that the site belonged to him. The portion that he encroached on has a water tap and toilets belonging to the applicant. PW1 further stated that they approached the chief of Mapeleng to report the matter. The chief was also surprised as she knew the site to belong to the applicant. The chief promised to attend to the matter but when there was no response from the chief, the applicant took the matter to court.

[15] The second witness was the secretary of the applicant. He testified that the church had acquired the site by way of a donation. His evidence was that the church came to know the 1st respondent in 2010 as alleged by the PW2. Most of his evidence corroborates that of PW1 in most material respects. During cross-examination, he conceded that when the site was allocated to the applicant, he was still young and he could not testify to that fact.

[16] The last witness for the applicant was the Chief of Mapeleng Ha Mabote where the site in dispute is located. Her testimony was that she knows both the applicant and the 1st respondent in this matter. She also confirmed that the site the applicant is currently occupying was allocated to it sometime in 1980 by her

mother-in-law while she was in office as the chief of Mapeleng. She further testified that though she was not yet in office, she consulted the elders who confirmed same to her.

[17] She added that in 2013, she was approached by the members of the applicant requesting her to write a letter to the Land Allocation Authority (LAA) to confirm that indeed the site belonged to the church. Since she knew this to be true, she did that. She further mentioned that she was not familiar with the measurements of the site in question. She confirmed knowing the 1st respondent as her subject but disputed his claim that the site belongs to him.

[18] The Chief initially testified that the disputed portion does not belong to anyone but is used as a public path way. But when asked by the applicant's counsel whether she can dispute that the site belongs to ZCC, she conceded that she could not deny it as she had no knowledge of its actual measurements. During cross-examination, the material case of the respondents was put to all three witnesses and they all vehemently denied the allegation that the disputed site as well as the site the ZCC is occupying currently, belong to the 1st respondent.

[19] At the close of the applicant's case, the 1st respondent took the stand and gave a brief history on how he came to occupy the land adjacent to applicant's site. He stated that both the disputed site and the one he is occupying belong to Tsiu Khoeli, DW2. He gave the measurements of the disputed portion as being 30 x 25 metres. It was his further evidence that out of goodwill, he built toilets for the applicant on its site as its congregants used to relieve themselves in the nearby dongas.

[20] It was his further testimony that he is the one who allowed the applicant to use the disputed site to access the church. Per his version, the dispute arose when one of his vehicles knocked down the water pump. He then ordered the applicant to remove the pipes and the tap from his yard but they refused. During that time, he noticed that the applicant was digging up a toilet pit inside his yard on the disputed portion and when he confronted the members they refused to stop.

[21] He then approached DW2 and asked him to intervene but all in vain. DW2 then advised him to report the matter to the chief. When they were before the chief, they found out that the applicant had already reported the matter. He further stated that the chief was hostile and told him that he had extended his site, an allegation he disputed and stated that he had acquired the site from DW2. He added that two Form Cs were produced and it became clear from the admission made by one Luka that the applicant was the one who extended its site measurements. He added that the chief was surprised and could not comment further.

[22] When he took the witness' stand, DW2's testified that he was the owner of the disputed site only and that he had requested the 1st respondent to oversee his land as his site was adjacent to his. Contrary to what the 1st respondent told the Court, the witness stated that he does not have a say on the site occupied by the applicant because he had transferred that land sometime in 1988 to one Lerato and it seemed that Lerato too transferred the land to the applicant.

[23] DW2 added that he inherited the site from his father through a will in 1989 but does not have a Form C for it as there were none at that time. He added that the site is rectangular in shape. He also gave its measurements. DW2's version was that a dispute arose when the applicant was refusing to give

the 1st respondent access to his site and he had to intervene and introduced him to the applicant's members. He confirmed that they approached PW3 to report the matter because the applicant's members were not cooperative. He also indicated that at the chief's place the applicant was represented by Mr. Luka who admitted before the chief that he had altered the measurements of the Form C belonging to the applicant.

[24] At the end of the trial, the court *mero motu* ordered the holding of an inspection in loco at the end of which it read its observations in open court and both counsel agreed that it was an accurate description of the place.

[25] In the light of the fact that the case of the 1st respondent and the submissions that were made on his behalf, by and large rest on the application of or points of law, namely non-joinder and invalidity of the applicant's tiltle deed to the disputed site.

[26]In connection with the question of non-joinder, the 1st respondent's counsel, **Mr. Setlojoane** made the contention that the applicant's failure to join Tsiu Khoeli who as the actual owner of the site, has a direct and substantial interest in the outcome of these proceedings, renders this application fatally flawed for which it ought to be dismissed and on this point alone.

[27] Counsel also contended that when the Form C was issued to it, the applicant was not yet in existence as it was not registered and could not hold title to property. In support thereof, he referred the Court to the **Administration of Lands Act**.[2] He submitted that the applicant was incapable to hold title to land because it was not a body corporate established in terms of the law.

[2] Section 9 (1) (a) (iii) of Act No. 16 of 1973

[28] Further that the Form C has not been registered to date and as such is invalid because in terms of the provisions of the **Deeds Registry Act**[3], it is mandatory to register same within three (3) months of the date of issue and failure to do so, renders it null and void and of no force or effect. It was his submission that under those circumstances, the right of occupation and use revert back to the state which in turn extinguishes title to land. That in the present case, the applicant has not applied for an extension of time with the Registrar of Deeds in accordance with the law and did not even suggest that it has in its evidence.

[29] Counsel also contended that while the law sanctions donation of land, the alleged donation of the site to the applicant by the late Paulina Mabitso is invalid because it was not done in compliance with the procedures that are laid down in the law such as obtaining the requisite ministerial consent.[4]

[30] For the applicant**,** the submission made by **Ms Lesaoana** on the special plea of non-joinder was that that it does not form part of the objections that may be raised by a party by way of a special answer in terms of the **Land Court Rules**.[5] She added that the Rules were meant to do away with unnecessary technicalities in land matters hence they do not include all the other points of law that may otherwise be raised in other cases.

[31] She however added that should the Court find that the point was properly raised, the answer lies in annexure **ZCC3** in which the site is clearly said to belong to the 1st respondent. It was her submission that this point was therefore raised merely as a delaying tactic as the 1st respondent has stated in his letter addressed to the LAA that "the site is his lawfully acquired property". Further

[3] Section 15 (4) of the Deeds Registry Act 1967
[4] Vicente V Lesotho Bank LAC (2000-2004) 83
[5] Rule 66(2) of the 2012 Rules

that the said Tsiu Khoeli testified before this court that the site in question does not belong to him but to the 1st respondent and that this point has no merit.

[32] In connection with the validity of the Form C that was issued to the applicant in 1980, Ms Lesaoana submitted that the Chief acted in compliance with the law that was in operation at the time[6] as ex facie, it was issued in April 1980 whereas the 1979 Act that the 1st respondent seeks to rely on came into operation on the 16th June 1980. She also quoted the judgment of Cotran CJ in **Maseela v Maseela**[7] which made a finding to this effect.

[33] Further that the declaration of Maseru as an urban area within which the site in question falls was done in terms of the same Act of 1979 which only came into operation in June 1980 after the applicant had already been issued a lease in terms of the law in April 1980 prior to the commencement of the 1979 Act. That in addition, while the applicant concedes that it failed to register the site in terms of the provisions of the 1979 Act, read with those of the Deeds Registry Act, that per se does not revoke its title to land as same was never revoked in terms of the law. To this end, counsel referred the Court to the case of **Mokuena v Mokuena & Another.**[8]

[34] Counsel for the applicant added that in terms of the evidence, the applicant was registered in 2003 but that its non-registration at the time it acquired the site, did not render its title invalid as such registration was not a statutory pre-requisite at that time. That in addition, the chief of Mapeleng confirmed the allocation in 2013 as is reflected in her letter **ZCC2**.

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[6] Section 15(1) of the Land Act No. 20 of 1973
[7] Fransisca M. Maseela v Enea M. Maseela CIV/APN/16 of 2002 (unreported)
[8] Melato Caleb Mokoena v Makarabo Mokoena and 4 Others CIV/APN/216/05 (unreported)

[35] Further that over and above all these, the applicant has been in occupation of the land in question since 1980 to-date, a period spanning thirty (30) years. It was her submission that the applicant is thus the rightful owner of the land in dispute.

I now turn to deal with the issues raised seriatim.

Non-joinder

[36] It is a well established principle of law that parties that have an interest in proceedings should be joined.[9] This is a basic common law principle and one of the corner-stones of equity, justice and fairness as it ensures that court orders are not made against people that are likely to be affected by them without their having been heard. Thus, in my view, the fact that non-joinder is not listed as one of the objections under the Land Court Rules does not do away with this basic principle.

[37] Where non-joinder is pleaded, the question for enquiry is whether, the party sought to be joined has a direct and substantial interest in the matter. In this connection, the test therefore, whether the alleged interest is direct and substantial is whether it a legal interest in the subject matter, whose judgment may prejudicially affect such a party.[10]

[38] Thus, in **Gordon v Department of Health**[11], the court quoted with approval the case of Amalgamated Engineering Union[12] where it was stated; '*in the case of Amalgamated Engineering Union case, it was found that the question of joinder should . . . not depend on the nature of the subject matter . . .*

[9] Matime & Others v Moruthoane & Another LAC [1985-1989] 200
[10] Manthabiseng Lepule v Teboho Lepule C of A (CIV) No. 5/2013; Basutoland Congress Party v Director of Elections and Others (LAC) 1995-1999 587 at 599;
[11] (337/2007) (2008) ZASCA 99
[12] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)

but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'.

[39] The court formulated the approach as being firstly to consider whether the third party would have the *locus standi* to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make, would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.[13] This has been interpreted to mean that if the order or judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.

[40] Coming back to the present matter, the question for enquiry is whether, on the evidence presented on behalf the respondents, it has been proved that DW2 has any substantial interest in these proceedings. In this regard, I am of the view that this is not the case. This is because both he and the 1st respondent gave contradictory evidence on the material aspects of the alleged ownership of the site.

[41] It should be remembered that counsel for the 1st respondent consistently put to it to the applicant's witnesses during cross-examination that DW2 will testify to the effect that he was the owner of the disputed site as well the one occupied by the applicant and that his rights were not revoked when the site was donated to the applicant by the chief of Mapeleng.

[42] Surprisingly, when DW2 testified before the court, his evidence was that the disputed portion was the only site that once belongs to him yet in his

[13] Amalgamated Engineering Union (supra) p

evidence-in- chief, the 1st respondent indicated that the disputed site and the one adjacent to the applicant's site belonged to DW2. He too did not say the land which the applicant is currently occupying belongs to DW2. He only made specific reference to the disputed portion to indicate that the two sites belong to DW2.

[43] The case of the respondent is thus never precise or exact. It keeps on changing. The court has three different versions regarding the respondents' case on ownership. The first version was that the whole plot or site belonged to DW2. The second version was that the disputed portion and the site which the 1st respondent occupies belong to DW2 and the last version was to the effect that only the disputed portion belongs to DW2. The position of the 1st respondent kept on changing to the extent that during the addresses counsel abandoned his main ground of non-joinder and pursued his claim on the basis of the other points which was wise in my view.

[44] Indeed as the respondent's evidence stands, there were serious contradictions as to whether DW2 was the true owner or not such that he ought to have been joined in this application. On the other hand, the evidence of the applicants remained the same in all material respects.

[45] In addition, not even a single document was presented before the Court evidencing that DW2 was true owner of the plot(s) in question. Secondly, he testified that the applicant has been in occupation of the site since 1989 while he only introduced himself in 2013 when the dispute arose. What is also surprising is the fact that developments were made on the plot, i.e. the water tap as well as the toilets and he conceded during cross- examination that he heard about those things but done but did nothing about them.

[46] During the inspection of the premises, the court observed that the water meter and the toilets erected in the disputed portion were very old which

evidently supports the contention that they were erected a long time ago. The toilets are visible and if DW2 is the owner of the site who also resides at Mapeleng, he ought to have acted as soon as he saw those developments on his plot.

[47] Further, when the 1st respondent was giving evidence, he kept on referring to the site as "my site" yet he told the Court in the beginning that the disputed site and the site he is occupying belong to DW2. There was also evidence from both the respondent's witnesses that when they were at the chief's place, Luka made the concession that he altered the applicant's Form C and encroached on DW2's site. According to them, PW3 was very surprised when two Form Cs were produced and that the forged Form C is the one that the applicant is relying on.

[48] However, this evidence was never put to PW3 when she was in the witness box. Another factor that renders the version of the respondents highly improbable is the 1st respondent' testimony before this court that when they were before the Chief, he told her that the disputed portion belongs to him because he bought same from DW2. Further, in the letter marked exhibit D in which he objected to the applicant's application for a lease, the site is referred to as his which he lawfully acquired.

[49] It is for these reasons as well as the fact that the 1st respondent's did not produce any document as prima facie evidence that the disputed site was allocated to him or Khoeli, that I make a finding that the applicant's story was not only the more probable, but has been satisfactorily substantiated. The 1st respondent's version is thus dismissed for not only being highly improbable, but because I have come to the conclusion that it is so fraught with serious discrepancies that it is downright false. In his own words, Tsiu Khoele denied that the site belongs to him and told the Court that it belongs to the 1st

respondent. On the basis of these reasons, the respondent's point of non-joiner has no merit and falls to be dismissed.

Validity of the Form C

[50] With respect to the question whether the Form C that the applicant was issued by the chief in 1980 is valid or not, the submission of Ms Lesaoana was that it is indeed as confirmed by PW3. Further that the statutory provision that the 1st respondent invokes in support thereof cannot stand as the Land Act of 1979 came into operation after the Form C was issued.

[51] I accept this submission as correct because my perusal of the relevant government Gazette[14] revealed that it came into operation on the 16th June 1980 which was after the Form C was issued. At any rate, the allegation that it was issued fraudulently was not substantiated by any evidence. Instead, the Chief testified in support of the applicant and disputed the suggested fraud.

[52] However, even assuming without accepting that this could have been the case, the most crucial question is whether the 1st respondent has a better right over the applicant which would give him the locus standi to defend these proceedings and raise all the legal questions that he has with respect to the applicant's title.

[53] Basing myself on the fact that 1st respondent has dismally failed to prove that he has a better title if any over the applicant , I am of the view that he does not have the necessary *locus standi*. Not only was his and DW2' testimonies hopelessly false, but he did not produce any documentary evidence whatsoever, to prove his alleged title to the disputed portion of the site. I accordingly find that he is non-suited to raise these defences.

[14] Government Notice No. 71 of 1980; The Land Act 1979 (commencement) Notice

[54] Further, the evidence before the Court has proven on a balance of probabilities that neither the 1st respondent nor DW2 have any title to this land. It is trite that a person intending to institute or defend legal proceedings must have a direct and substantial interest in the right which is the subject matter of the litigation. See in this regard, the case of **Jacobs En Ander v Waks En Andere**[15].

[55] In other words, even if the 1st respondent might have been correct to allege that the Form C as well as the donation of the site, were effected contrary to the law, this does not bestow on him the requisite *locus standi* to raise these issues/defences in the absence of legitimate title to the land in question on his part.

[56] In the case **o**f **Minister of Safety and Security** v **Gabrielle Lupacchini and Others**[16] the court stated as follows at par 26 of the judgment;

> *"The term locus standi in iudicio is properly used in two senses. In its primary sense it refers to the capacity to litigate, that is the capacity to sue or to be sued at all. Capacity to litigate is of course not the same as the capacity to act ("handelingsbevoegdheid") but there is usually a close correlation between them. In its secondary sense the term locus standi in iudicio deals with whether a person has a sufficient interest in the subject matter of the case to be allowed to bring or defend the claim".*

[57] In my opinion, the issue in the present case falls under the secondary sense of *locus standi in judicio*. While Counsel for the 1st respondent argued that the Court should declare the site in question as belonging to the King because both parties have no title to it, it is my view that this submission flawed because the question is whether such a judgment will have a practical effect or result. It is trite that the outcome of the case must have a meaningful and practical effect. It is not enough for a party to come and oppose a matter on the basis of a defence that will have no effect. It should show that it has the

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[15] 1992 (1) SA 521

[16] [2009] ZAFSHC 82 (3 September 2009)

necessary locus and a clear right in the subject matter. I therefore find this submission to be without substance as I have already found that neither the 1st respondent nor DW2 produced any proof that they own the site.

[58] In addition, the applicant' s claim is that it has lawful title to the land which means that the only party that could have the standing to be properly before this court to defend the matter is the one that would show that it has the legal interest to do so as supported by the evidence. Otherwise, the order that is suggested by the 1st respondent would set a bad precedent in that any person including busybodies would be allowed to come before the court on a claim or defence as the case may be, that has no legal basis. Thus the 1st respondent's suggestion has to fall away.

[59] The other issue which is of great importance that was raised on behalf of the applicant albeit no authorities were cited in support thereof is the question of acquisitive prescription possession. The applicant stated in its papers and evidence that it has been in peaceful occupation of the site for more than thirty years uninterrupted until the 1st respondent came and sought permission to use part thereof to gain access to his adjacent one. Only for him to later become hostile and encroach on the applicant's land.

[60] Further that since it took occupation and was issued a Form C, the applicant made some developments on the site which DW2, Tsiu Khoeli 'the alleged owner' knew about but for some reason never challenged them until the 1st respondent brought him into the picture and only after the institution of these proceedings. Further that even if it were to be accepted that DW2 was the lawful owner, he would have legally waived his right of ownership to the applicant because the latter would have acquired it through acquisitive possession.

[61] The requirements of acquisitive possession under the common law were outlined by Coleman J in the case of **Morkels Transport v Melrose Foods and Another**[17] in the following words;

> *"Among the common law requirements, in addition to continuous, uninterrupted possession, necvi$_t$ nec clam, necprecario, 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 (possessiociviliS), 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)".Clearly, even if applicant was unable to prove that the site belongs to it, then applicant would have created a prescriptive title over the said land because the case falls squarely under acquisitive possession".*

[62] In the light of the above stated position, it is my finding that even if it were to be accepted that the land in dispute once belonged to DW2 as alleged, the present applicant has successfully demonstrated that it now belongs to it since 1980 through acquisitive prescriptive possession and that accordingly, it ought to succeed. The case of the applicant fits neatly into the above quoted requirements and is has to succeed in its claim.

[63] It is on the basis of all the foregoing reasons that I make the following order:

a) The respondents are interdicted from building on and fencing the applicant's site.
b) The agreement between the applicant and the 1st respondent that the latter temporarily occupy or use the former's site is hereby cancelled.
c) The 1st respondent is directed to remove the fence from, and vacate the portion of the applicant's site that it has already fenced and occupied.

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[17] 1972 (2) SA at 476 G

d) The applicant is hereby declared the rightful and lawful owner, and occupant of the site in issue.

e) The 1st respondent is ordered to pay the costs of suit.

N. MAJARA
CHIEF JUSTICE

For the applicant : Ms Lesaoana

For the respondents : Mr. Setlojoane