ACCESSION OF LOTS: *ACCESSIO PER ARTES MAGICAS*?

Pocock v De Oliviera 2007 2 SA 90 (W)

1 Introduction

One of the challenges of being a property law teacher is marking the script of a student who has "spotted" accession for the exam, but answers a question dealing with restrictive conditions by writing shotgun-style everything he or she knows about accession. The same feeling is experienced when one reads the above decision. The only difference is the absence of students in this case.

2 Facts

The facts of the case may be summarised as follows: During 1907 one Alexander became the owner of 24 erven, being lots 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 of the Kensington Township of the Farm Doornfontein No 24, in the District Johannesburg.

The term "lot/lots" will be used in this discussion due to the reference thereto in the conditions of title, rather than the more conventional and accepted South African term of "erf/erven".

All the title deeds to the lots were subject to two conditions of title, namely (a) a prohibition against subdivision or splitting up and sale or disposal in less than four lots each, except with written consent of the company (the township owner) (93G); (b) specifications regarding the residence to be built on only one block of the four lots (93H-J). The two relevant conditions of title are stated in column 1 of the Annexure to this discussion. On 29 April 1938 the 24 aforementioned lots were transferred to a certain Venter, subject to the same conditions indicated above (94A-B). In terms of a notarial agreement, dated 17 September 1938, the township owner, Venter and the City Council of Johannesburg concluded an agreement (hereafter referred to as the "Notarial Amendment Agreement") that amended the above conditions of title in respect of the 24 lots owned by Venter (94D-E). The terms of the abovementioned conditions were deleted and substituted with new but similar conditions of title (94). The new conditions of title are set out in column 2 of the Annexure to this discussion and the differences between the new and old conditions are underlined. Unlike the first of the old conditions, the newly amended first condition no longer contained a

minimum number of lots into which the original lots may be split. The newly amended second condition contained requirements regarding the residence to be built on each one of two lots mentioned in pairs of two. The block comprising lots 5554 and 5555 was disposed of to various successors in title and registered in their respective single title deeds, subject to the conditions of title relating to the subdivision and splitting up of the lots and the residences to be constructed on the two lots (see 95A-F). On 5 February 1998 the block comprising lots 5554 and 5555 was transferred in a single deed of transfer to De Oliviera (95G). On 12 October 2001 the Sheriff caused lot 5554 to be sold by public auction to Du Plessis. The sale was pursuant to a warrant of execution that was issued in an action instituted by the second respondent, the municipality, against De Oliviera in respect of arrear rates and taxes levied by the second respondent (95G/H-I). Pocock thereafter purchased lot 5554 from Du Plessis, which was transferred by the Sheriff directly to Pocock (95I-96A).

Thus, Pocock became the owner of lot 5554 situated at 86 Westmoreland Road, Kensington, whilst De Oliviera remained the registered owner of lot 5555. The latter property remained landlocked without any servitude of way and accordingly, had no street address (93F/G). The two lots constituted a block, which was fenced in as one unit, with no boundary or fence between them. The two lots had been developed jointly with a single house built on lot 5554. The outbuilding extended from lot 5554 onto lot 5555. There was a swimming pool on lot 5555. The garden extended from lot 5554 and flowed naturally, as a single unit, onto lot 5555, with no visible boundary or separation between the two lots (92H). There were no structures situated on lot 5555 that could be used as a residence. The municipality rendered municipal services such as electricity, water, sewerage and refuse removal to lot 5554 but not to lot 5555 (92I-93A). The municipality, however, collected property rates and taxes on separate accounts in respect of lots 5554 and 5555. Both the lots were 495 square metres in size. As stated before, only lot 5554 bordered on a public road, namely, Westmoreland Road (93B). There was furthermore no servitude in favour of lot 5555 over lot 5554 or any other parcel of land that would have permitted access from a public road to lot 5555 (93B).

3 Restrictive conditions

The legal background is as follows: Even though the court referred to “restrictive title conditions” (99G/H) and it being a limited real right (99H), such recognition did not guide the court to decide the matter with reference to the principles applicable to restrictive conditions. What follows is not intended as a detailed discussion of restrictive conditions.

A new kind of “servitudal right” was developed by the courts on the model of English law in the case of conditions or covenants restricting the use of a tenement for certain purposes (Van der Merwe and De Waal *The Law of Things and Servitudes* (1993) 208). Restrictive conditions are restrictions placed on the ownership of land, which are imposed in the process of township establishment and inserted into the relevant title deeds

(Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 5ed (2006) 343; and see also Van der Merwe and De Waal 208). These restrictive conditions are agreements creating non-statutory limitations on the use of land inserted by the original township owner, in favour of each and every purchaser of the lots forming part of the township, as part of a general township scheme and registered in the title deeds of the lots. Incorporating restrictive conditions in title deeds goes a long way to establishing a sought-after development in that these conditions are usually employed to enhance and protect the particular character of an area (Badenhorst, Pienaar and Mostert 344; Van der Merwe *Sakereg* (1989) 502; and Sonnekus and Neels *Sakereg Vonnisbundel* (1994) 645). In this way owners could be required, for example, to build in accordance with a particular architectural style or could be prohibited from building more than one dwelling on a lot, thereby regulating the density of the area. Restrictive conditions are regarded as negative servitudes by the courts (Van der Merwe 501; Sonnekus and Neels 645), even though they are more correctly classified as real rights *sui generis* (Van Wyk *Restrictive Conditions as Urban Land-use Planning Instruments* (1990) LLD Unisa 105-106 and 137-152; "The Nature and Classification of Restrictive Covenants and Conditions of Title" 1992 *De Jure* 270 287-288; *Planning Law – Principles and Procedures of Land-use Management* (1999) 17 18; and "Revaluation of Conditions of Title" 2002 *THRHR* 646-574). In light of the servitudal approach followed in the courts, it is understood that, when restrictive conditions are registered against each lot in favour of the township owner, such conditions constitute *personal* servitudes in favour of the township owner and his or her successors in title. However, the restrictive conditions may constitute *praedial* servitudes if they are imposed to benefit and restrict each and every lot in the township, and the owners are in their capacity as owners bound to each other. In the former case, the so-called personal servitude approach, only the township owner is entitled to enforce, waive compliance with the conditions or modify the conditions. In the latter instance, the so-called *praedial* servitude approach, every owner is entitled to enforce the conditions and at common law all owners must consent to the waiver or modification thereof. This flows from the premise that all of these lot owners have reciprocal rights and duties in relation to the properties (see Badenhorst, Pienaar and Mostert 346 354; see also Van der Merwe and De Waal 208; and Sonnekus and Neels 645). Restrictive conditions can be removed by court order only if all the interested parties agree (Van der Merwe 504; and Van der Merwe and De Waal 209). In terms of the Immovable Property (Removal or Modification of Restrictions Act 94 of 1965) removal of restrictive conditions can take place if all the parties do not consent. (As to other modes of modification or removal of restrictive conditions, see Badenhorst, Pienaar and Mostert 354-356).

4 Legal relief

The applicant sought relief on the following bases: that (a) lots 5554 and 5555 were notarially tied pursuant to the Notarial Amendment Agreement;

(b) ownership had been acquired by way of prescription; and (c) accession had occurred, thereby vesting ownership in the applicant.

5 Decision of the court

5 1 The court decided correctly that a notarial tie agreement had not been concluded. The court reasoned that a notarial tie agreement, by its very definition, requires the agreement to be in writing between the owners of the respective lots and the local authority (97C-D). Since that had not occurred in the present circumstances, no such agreement had been concluded.

5 2 Acquisition of ownership of lot 5555, by virtue of section 1 of the Prescription Act 68 of 1969, was also ruled out by the court by finding that the applicant had failed to show possession for an uninterrupted period of 30 years (97G). The court reasoned that in order to create a prescriptive title, "occupation must be a use adverse to the true owner and not occupation by virtue of some contract or legal relationship, such as a lease or usufruct, which recognises the ownership of another" (97G-H). Lot 5554 was only registered in the name of the applicant during 2001 (see 96A). Possession of lot 5555, if it ever existed, could only have started from that moment. However, absence of possession and an uncompleted prescriptive period already negates prescription. Reliance on the "adverse user" requirement in the present circumstances was therefore totally unnecessary (as to the redundancy in our law of requiring "adverse user" as an additional requirement for acquisition of ownership by prescription, see Van der Merwe 279-280; Badenhorst, Pienaar and Mostert 166-167; and Sonnekus and Neels 313-314).

5 3 According to the court, the central pillar on which the applicant's case was based, was that lot 5555 had been attached to lot 5554 by way of accession (97I). Had this in fact occurred, it would have amounted to a form of accession never before seen in the common law or South African law.

The court set out the principles of acquisition of ownership of an accessory by accession to a principal thing (98B-C); the tests to determine which of the things that have been joined together is the principal thing (98D/E); the three types of accession, namely natural, industrial and mixed accession (98D/E); as well as the tests to determine whether the requirements for accession had been met (98E/F).

Because this was clearly not a case of accession the treatment of accession as a mode of acquisition of ownership by the court will not be scrutinised here. It suffices to say that, where land is involved, it is always regarded as the principal thing (Van der Merwe 244-245). Reference by the court to and reliance on *Sumatie (Edms) Bpk v Venter* (1990 1 SA 173 (T)) can also be questioned. Criticism against the correctness of the *Sumatie* decision was recognised by the then Appellate Division in *Konstanz (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* ([1996] 2 All SA 215 (A) 222b-c; 1996 3 SA SA 273 (A) 281G). Even in

relation to Van der Merwe's first category of accession identified in his exposition, namely of soil ("grond") to soil (Van der Merwe 232) or immovables to immovables ("Things" LAWSA Vol 27 (first reissue) 2002 251), such accession involves sand, silt or soil which becomes movable by the action of a river, the sea or torrents, *before* it accedes to land, in cases of *alluvio* and *avulsio*, for instance (see further Badenhorst, Pienaar and Mostert 142 fn 56). One considers whether the court did not *literally* interpret the above-mentioned category as accession of immovables to immovables in the sense of one lot to another lot. However, the court relies on Van der Merwe and De Waal for the view that "accession to immovables can take place in the following forms: alluvion; avulsion; an island arising in a river; or a river changing its course" (99B-C) in its finding that none of these forms applies to the present case (99C). The court also distinguishes this case from the other forms of accession as identified by Van der Merwe, namely attachment of a movable to an immovable or a movable to another movable (99F). The court found that the applicant had failed to indicate that attachment of lot 5555 had not been permanently or indefinitely affixed to lot 5554 in such a way that the attachment formed a new independent entity (99B). The court reasoned that the physical attachment of one thing to another was absent (99). The court also reasoned that the applicant failed to indicate that lot 5555, in its nature, was capable of acceding to lot 5554 (99D). Though true in more than one sense, this is a requirement for building (*inaedificatio*) as a form of accession (see Van der Merwe and De Waal 126-127; and Badenhorst, Pienaar and Mostert 147). The court reasoned further that the applicant had failed to indicate that there was effective attachment (99D). Though true that it is a general requirement for accession, it is irrelevant here because the present circumstances do not constitute a case of accession, as legally known until now. Land is individualised into separate things by creation of lots (or erven) in terms of legislation. This was recognised by the court (99J). Merger of ownership of respective lots, as a real right, can take place if one person becomes the owner of two lots. The object of such ownership remains two separate lots unless the two lots are, for instance, consolidated by a certificate of consolidated title (see s 40 of the Deeds Registries Act 47 of 1937). The separate lots can be tied by a notarial agreement between the owners of the respective lots by creating reciprocal servitudes in respect of the lots.

As an observation the court stated that the condition of title of lot 5554 could not be elevated to a real right granting ownership of lot 5555. The court correctly pointed out that ownership of lot 5555 could only be transferred by De Oliviera to Pocock, which De Oliviera was not willing to do (99G-I).

As another general observation the court hinted that Pocock had purchased lot 5554 in the mistaken belief that she was purchasing both lots. The court indicated that Pocock was responsible for her mistake as to the object of sale and that she had refrained, for three years, from pursuing other possible remedies available to her (99F).

6 Discussion

Acquisition of ownership of a lot is not legally possible by accession of such lot to another lot, the latter owned by the person relying on accession as an original mode of acquisition of ownership of land. The court's attempt to entertain this argument amounts to accession of lots by *accessio magica*. Both lots 5554 and 5555 were subject to the conditions of title, as amended by notarial agreement. Acquisition of lot 5554 by the applicant took place subject to the restrictive conditions as indicated in the second column of the Annexure. As to the first amended condition it should be noted that reference is only made to the fact that the lot should not be divided (in the sense of a subdivision of land) or "split up". With reference to the first old condition, "split up" (and sold and disposed of) referred to "in less than lots of four lots each" (in other words, a reference to a block). Given the history of the development of the township and the specific inclusion in the second amended condition of the notion of blocks comprising of two lots, "split up" in the first amended condition should probably have referred to, or have been interpreted as, "in less than lots of two lots each" and not in the sense of an alternative term for subdivision of the land. If this interpretation is correct, the amended notarial agreement and the title conditions will have to be rectified, unless it was clearly not the intention of the parties to the notarial agreement. Upon such interpretation, the acquisition by Pocock would have amounted to a possible contravention of the registered first restrictive condition regarding "split up", which could have been contested by an interested party other than the respondent (for example, during the sale in execution). During the sale in execution the restrictive conditions ought to have been taken into account. In fact, *any* disposal of the lot ought to have taken place subject to the title deed conditions. If "split up" in the amended first conditions is not given the above-mentioned meaning, it perhaps explains how registration of transfer to Pocock could have taken place in the first place in the deeds office. By simply focusing on the first amended condition, registration of lot 5554 in favour of Pocock would not have appeared to be a contravention thereof. Buildings erected in contravention of the second amended condition would also constitute a breach of said restrictive condition.

Upon a possible breach of a restrictive condition the following questions arise: Firstly, whether the conditions of title are validly registered and modified; secondly, whether the person who seeks to enforce the restrictive conditions has the necessary *locus standi* (either as holder of a personal servitude or a *praedial* servitude in accordance with the servitudal approach followed by the courts); thirdly, what the exact meaning of the restrictive condition is (see Badenhorst, Pienaar and Mostert 346); and fourthly whether the conditions of title were removed (*ie* terminated).

Lots 5554 and 5555 remain subject to the restrictive conditions set out in the second column of the Annexure. The court also made reference to another application lodged by De Oliviera for an order establishing a permanent servitude of a right of way of necessity over lot 5554 because lot 5555 is landlocked. This matter still needs to be considered (96F).

Irrespective of the outcome of such application for a way of necessity, the removal of the prevailing restrictive condition in any event seems to be the logical option to pursue. The present *praedial* restrictive condition can be removed if all the interested parties agree thereto or another mode of removal is opted for (see Badenhorst, Pienaar and Mostert 354-356).

7 Conclusion

The fundamental distinction between original acquisition and derivative acquisition of ownership, and the distinction between ownership and limited real rights, remains the starting point in property law disputes. In relying on a mode of acquisition of ownership, the basic distinction and requirements for such mode of acquisition of ownership should be adhered to as being part of the basics. If the different forms of accession, whether in terms of the Romanist classification or the classification proffered by Van der Merwe, and the requirements thereof were taken into account, the court hopefully would not have been confronted with such an argument. Accession of one lot to another lot should have been dismissed as *accessio per artes magicas*.

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ANNEXURE

Conditions of title in original title deeds	Conditions of title as amended
"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." (93G)	"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 purposes first had and obtained." (94E-F)
"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 consent of the said company consents 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, have due regard to the frontage line hereinafter mentioned." (93G/H-J).	"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 specification; and its 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." (94G-J).